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In the Supreme Court of the United States

OCTOBER TERM, 1984

ELLIET N. ARONSON, LUCIA B. BROWNING, NOE CORDEIRO, LAWRENCE CRIVELLI, RICHARD GIGUERE, ROBERT GOLDMAN, WALTER HARUBIN, HUGO TIETZE, and JOHN ZIELINSKI,

PLAINTIFFS-PETITIONERS,

v.

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, CHROMALLOY AMERICAN CORPORATION, DONALD TOBIN, TRUSTEE, AND JOHN CARUSO, TRUSTEE,

DEFENDANTS-RESPONDENTS.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Employee Retirement Income Security Act of 1974, must employee pension benefit plan termination provisions be construed strictly against employers who unilaterally impose those provisions, and in favor of employees and their continued participation in such plans?

2. Is it discriminatory within the meaning of 29 U.S.C. §1140 for an employer to terminate the participation of certain of its employees in an employee pension benefit plan, where these employees continue to meet the express eligibility and participation criteria set in the plan, and have not voluntarily withdrawn from it?

3. Is it discriminatory within the meaning of 29 U.S.C. §1140 for an employer to set a retroactive termination and valuation date for the participation of certain of its employees in an employee pension benefit plan, and to apply the earnings and appreciation allocable to those employees' accounts in the plan to the sole benefit of other employees who continue to participate in the plan during the interim between the termination/valuation date and the date of disbursement, all in the absence of express authority in the plan to do so?

4. Is "invidious intent" a necessary element of discrimination within the meaning of 29 U.S.C. §1140?

5. Is there a "business justification" exception to the prohibition against discrimination contained in 29 U.S.C. §1140?

PARTIES

All parties to the proceedings in the courts below are named in the caption of the case in this Court.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

ELLIET N. ARONSON, LUCIA B. BROWNING, NOE CORDEIRO, LAWRENCE CRIVELLI, RICHARD GIGUERE, ROBERT GOLDMAN, WALTER HARUBIN, HUGO TIETZE, and JOHN ZIELINSKI,

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SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, CHROMALLOY AMERICAN CORPORATION, DONALD TOBIN, TRUSTEE, AND JOHN CARUSO, TRUSTEE,

DEFENDANTS-RESPONDENTS.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on March 21, 1984.

Reports

The decision of the District Court for the District of Massachusetts herein is reported at 566 F.Supp. 1545 (D. Mass. 1983). The decision of the Court of Appeals for the First Circuit herein is reported at 730 F.2d 12 (1st Cir. 1984).

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit entered on March 21, 1984. The plaintiffs' Petition for Rehearing En Banc was denied by an Order of the Court of Appeals which entered on April 20, 1984. The petitioners seek review of the judgment of the Court of Appeals pursuant to 28 U.S.C §1254(1).

Relevant Statutes

The statutes relevant to the consideration of the questions raised in this petition are set out verbatim in the Appendix hereto. The relevant provisions are sections of the Employee Retirement Income Security Act of 1974 which have been codified at 29 U.S.C. §§1001, 1104, 1132 and 1140.

Statement of the Case

The plaintiffs, petitioners herein, are nine former employees of the Servus Rubber Company division of the defendant Chromalloy American Corporation ("Chromalloy"). They were participants in the defendant Servus Rubber Division of Chromalloy American Corporation Employees' Profit Sharing Plan ("the Plan"), which is an employee pension benefit plan as defined in §3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(2). Chromalloy's Servus Rubber Company ("Servus") operated

two manufacturing facilities, one in Chicopee, Massachusetts, where the plaintiffs were employed, and the other in Rock Island, Illinois. The Company's contributions to the Plan were allocated pro rata among participants in the Plan who were employed by the company on December 31 of the year for which the contribution was made. The Plan provided that "[e]very Employee who becomes a Participant in the Plan shall . . . continue as a participant in the Plan until his death, termination of employment, or retirement." (A. 15).

In late August, 1981, a sale of a substantial part of the assets of the Chicopee plant was consummated and Servus began laying workers off as work wound down. In that same month, the Company notified the Chicopee workers by letter that it had decided to terminate their participation in the Plan and to apply to the Internal Revenue Service for a determination upon the termination. (A. 5, 21-22).

The Plan provision respecting termination is as follows:

> 12.1 *Event of Termination.* The Company, with the approval of the Pension Committee of Chromalloy American Corporation, reserves the right to terminate the Plan and Trust, or to discontinue completely Company contributions, by giving written notice of such termination or discontinuance, hereinafter referred to as the "Date of Termination," to the Trustee. (A. 16.)

"The Company" is defined in §2.1(a)(2) of the Plan as "the Servus Rubber Division of Chromalloy American Corporation."

Chromalloy's Pension Committee adopted a resolution on November 25, 1981, which purported to partially terminate the Plan and to set a retroactive termination and valuation date of September 30, 1981. (A. 3, 22). However, no written notice of termination was ever given to any of the Plan Trustees. (The

term "Trustee" is defined in the Plan as *all* of the Trustees.) Neither was any other action taken by Servus formally to adopt termination. The Plan does not expressly provide for retroactive termination.

Servus submitted an Application for Determination Upon Termination to the Internal Revenue Service in November, 1981. The IRS notified Chromalloy that termination would not affect the Plan's qualifications for tax purposes on January 21, 1982. The Company did not distribute the plaintiffs' accounts in the Plan until February 9, 1982, and then did so based on account values as of the retroactively set termination and valuation date, September 30, 1981.

Despite the fact that the plaintiffs were working at the Chicopee facility on December 31, 1981, and into 1982, and that this continued emloyment had been induced by a company decision to give severance pay only to those employees who would work until the company no longer required their services (A. 20), no contributions to the Plan were made on their behalf for 1981. Such contributions *were* made for the Illinois workers.

The plaintiffs brought an action under §§502(a)(1)(B) and 502(a)(3)of ERISA, 29 U.S.C. §§1132(a)(1)(B) and 1132(a)(3), in the United States District Court for the District of Massachusetts, for damages and declaratory and injunctive relief. Jurisdiction lay in the District Court under 29 U.S.C. §§1132(e)(1) & (f). After trial without jury, the District Court (Freedman, J.), ordered judgment for the plaintiffs, ruling that the Plan had been neither amended nor partially terminated to exclude the participation of the plaintiffs because the defendants had not complied with Plan provisions governing amendment and partial termination; that there had been no partial termination by operation of tax law provisions with respect to the plaintiffs; and alternatively that termination of the Plan as to the plaintiffs was discriminatory in violation of

§510 of ERISA, 29 U.S.C. §1140, there being no justification for termination of participation in the Plan prior to termination of the plaintiff's employment. (A. 25-31.)

The defendants, respondents herein, appealed to the United States Court of Appeals for the First Circuit, arguing primarily that the Plan had been terminated by reason of certain provisions of the Internal Revenue Code and related treasury regulations. The Court of Appeals, in a two-to-one decision (per Aldrich, Sen. J.) entered on March 21, 1984, vacated the order of the District Court and ordered entry of judgment for the defendants on the ERISA claims,[1] holding that the defendants' actions, while not strictly meeting Plan requirements for termination, were sufficient to effect termination under the Plan. (A. 3-6.) The Court also held that the termination was not discriminatory because there was no "invidious intent"; the termination had a "business justification" in the plant shut-down; and the termination cut along the "established lines" within the employer's operations. (A. 6-8.) The Court stated that it did not intend to reach the defendants' tax law argument. (A. 4.)[2]

Judge Coffin dissented, viewing the case "as one where insistence on at least substantial compliance with detailed requirements is amply justified by the nature of the problem, the intent of the relevant legislation, and the difficulties created by elevating substance over form." (A. 9.)

The plaintiffs' timely petition for rehearing *en banc* was denied by the Court of Appeals in an order which entered on April 20, 1984. (A. 40.)

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[1] The Court of Appeals affirmed the judgment of the District Court for the plaintiffs Aronson and Crivelli on a pendent contract claim for "fringe benefits."

[2] Having disavowed an intent to rule on the defendants' tax law argument, the Court incongruously stated that it would "adhere to" a tax regulation which speaks solely to the question of whether a plan is terminated *for tax purposes* when an employer begins to discharge employees in anticipation of the winding up of his business. (A. 7.) See *United States Steelworkers of America* v. *Harris & Sons Steel Co.*, 706 F.2d 1289, 1297-1299 (3d Cir. 1983).

Reasons for Grant of Writ

I. The Decision of the Court of Appeals Represents the First Departure by a Federal Court From the Rule That Plan Provisions Are To Be Strictly Construed Against Employers Who Impose Them.

Where an employee benefit pension plan's terms are unilaterally imposed by an employer, federal courts deciding cases under ERISA have *without exception* held that the provisions of the plan must be construed in favor of the employees and against the employer. *Landro* v. *Glendenning Motorways, Inc.*, 625 F.2d 1344, 1354 (8th Cir. 1980); *Moore* v. *Reynolds Metals Co. Retirement Program for Salaried Employees*, 563 F.Supp. 1372, 1374 (S.D. Ohio 1983); *Hayden* v. *Texas-U.S. Chemical Co.*, 557 F.Supp. 382, 389 (E.D. Tex. 1983); *Terrones* v. *Pacific States Steel Corp.*, 526 F.Supp. 1350, 1354 (N.D. Cal. 1981); *Bonar* v. *Barnett Bank of Jacksonville, N.A.*, 488 F.Supp. 365, 369 (M.D. Fla. 1980); *Shaw* v. *Kruidenier*, 470 F.Supp. 1375, 1382 (S.D. Iowa 1979), *aff'd mem.*, 620 F.2d 307 (8th Cir. 1980). See also *Bostic* v. *Ohio River Co. (Ohio Div.) Basic Pension Plan*, 517 F.Supp. 627, 630-631 (S.D. W.Va. 1981). The same precept was applied by federal courts in pre-ERISA cases. See *Rochester Corp.* v. *Rochester*, 450 F.2d 118, 121 n.4 (4th Cir. 1971); *Hudson* v. *John Hancock Mutual Life Insurance Co.*, 314 F.2d 16, 21 (8th Cir. 1963); *Smith* v. *Ethyl Corp.*, 417 F.Supp. 669, 676 (S.D. Tex. 1976).

Prior to its decision in the instant case, the Court of Appeals for the First Circuit had also maintained that "[w]here the employer establishes the terms of a pension plan, those terms should be construed in favor of the employee." *Hoefel* v. *Atlas Tack Corp.*, 581 F.2d 1, 7 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). The Court's decision here, however, runs directly contrary to the well-established body of law reflected in its own decision in *Hoefel*

It is beyond question that the Plan provisions here involved were completely within the control of the corporate defendants, as to both form and content. Under the Plan, Servus had a reserved right to amend the Plan in any detail, to terminate it at any time, or to change the amount or method of computing company contributions. (A. 3-4, 16-17.) The specific Plan language dealing with termination provides that "The Company [i.e. Servus], with the approval of the Pension Committee of Chromalloy American Corporation, reserves the right to terminate the Plan . . . by giving written notice of the date of such termination . . . to the Trustee." (A. 3-4, 16.) The Plan thus requires that termination be (1) by Servus, (2) with the approval of Chromalloy's Pension Committee, and (3) accomplished by giving written notice of the date of termination to the trustees.

Chromalloy's Pension Committee did adopt a resolution purporting to terminate the Plan partially and to set a retroactive termination date, but neither Servus nor any other person or entity gave the trustees written notice of the date of the termination as required by the Plan. (A. 6.) Delivery of such notice was the sole means provided under the Plan to effectuate a termination. Neither did Servus itself ever adopt, approve or promulgate *any* instrument of termination evidencing that it had, in fact, partially terminated the Plan.

Against this factual backdrop, a majority of the panel of the Court of Appeals reversed the decision of the District Court on the ERISA claim, holding that a termination had been accomplished. Despite the explicit Plan language detailing the requirement of written notice to the trustees, the Court inexplicably stated that "[t]here is nothing in the plan requiring the Company to manifest its action [i.e. the termination] in any particular manner." (A. 4.) The Court said that it was "empty" to charge that the trustees did not receive written notice, and that "[i]t should be enough" that two trustees, as officers of Servus, signed the August, 1981, letter to Servus

employees, notifying them of the impending termination. The Court ventured the opinion that these trustees must have been aware that Chromalloy's Pension Committee had approved termination, and noted that one of the trustees had signed the IRS Application for Determination Upon Termination. The Court concluded that "[n]o greater compilation of documents was required." (A. 6.)

Without question, the Court's willingness to allow Plan fiduciaries to substitute supposedly equivalent conduct or a state of mind for the specific acts required by Plan documents to terminate employee participation contravenes the longstanding rule of federal law, set forth *supra*, that plan provisions are to be construed in favor of employees and against the employers who unilaterally impose them. Having set a plan's ground rules for termination, the employer is bound by them, and his employees are entitled to rely on them, unless and until they are changed. The plan must be construed in favor of the employees and to avoid forfeiture of benefits. *Terrones* v. *Pacific States Steel Corp.*, *supra* at 1354.

The opinion of the Court of Appeals is also philosophically unsound. It is rooted in the view that plan fiduciaries need not be held to strict compliance with the documents and instruments governing plan operation if a court determines that the general purposes which *it* presumes to be behind the formal plan requirements have probably been accomplished in some other fashion. Thus, in the view of the Court of Appeals, the lack of the required written notice is excused because of the probability that the trustees were aware of the facts which the notice would have contained. (A. 5-6.) As former Chief Judge Coffin noted in his dissent, however, the "problem with this 'commonsense' approach, based on assumptions as to who knew what and when, is that it invites litigants and courts to consider the adequacy of conduct not conforming to the plan and to determine what may be accepted as a satisfactory equivalent." (A. 11.) In Judge Coffin's view, the "informal

proof" which would likely be used to establish these equivalencies "would surely be infinitely complex if not unworkable." (A. 11-12.)

ERISA does not permit a court reviewing action taken by plan fiduciaries to be satisfied by less than strict compliance with plan provisions. Section 404(a) of ERISA requires plan fiduciaries to discharge their duties with respect to a plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]," 29 U.S.C. §1104(a). Concern that fiduciaries comply with plan procedures pervades both the Act and its legislative history. See 29 U.S.C. §1001(b); H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4651; S. Rep. No. 93-127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4866; H.R. Joint Conf. Rep. No. 93-1280, *reprinted in* [1974) U.S. Code Cong. & Ad. News 5038, 5083.

The mischief which would result if the relaxed standards underlying the ruling of the Court of Appeals are allowed to stand is demonstrated on the facts of the present case. A formal, easily identifiable event of termination, such as written notice to the trustees, is of vital importance because of the necessity that implementation of the termination be delayed until the receipt of a favorable determination from the IRS as to the effect of the termination on the Plan's qualification for tax purposes. The letters sent to Plan participants in August, 1981, plainly characterized the Plan termination as being contingent on a favorable IRS determination, and understandably so. The effects of a retroactive disqualification of a plan upon termination are potentially staggering. See *United Steelworkers of America* v. *Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983). One may be sure that if the IRS determination received by Servus in January of 1982 had been adverse, the company would have taken the position that the termination had *not* been formally adopted, despite the letters

to participants and the vote of the Pension Committee, because notice of the termination date was never given to the Trustees and the "Event of Termination" therefore never occurred. Under the standard employed by the Court of Appeals, however, which substitutes a requirement of mere trustee "knowledge that partial termination was approved" (A. 6) for the Plan's requirement of written notice of the termination date, there is no bright line for determining whether or when the company has formally implemented termination. Under the Court's standard, the company and the Pension Committee could approve termination with the knowledge of the trustees only at great peril prior to receipt of the IRS determination. All of the factors relied upon by the Court of Appeals to support its conclusion that a termination was effected by the defendants (the letters to participants, the application to the IRS and the Pension Committee vote) occurred *prior to* receipt of the IRS determination. One must presume, under the logic of the Court of Appeals, that had the determination been adverse, the defendants would not have been able to disavow that a termination had already taken place.

In sum, the position of the Court of Appeals on the adequacy of the measures taken to terminate the Plan is against the longstanding rule employed by the federal courts in the construction of employee pension benefit plans; is contrary to the letter and spirit of ERISA; and embodies an impractical and unworkable approach to the resolution of cases such as this.

II. It Is Discriminatory To Terminate the Employee Pension Benefit Plan Participation of a Discrete Group of Employees Where Those Employees Meet All Applicable Plan Criteria for Continuing Participation and the Plan Remains in Operation.

The District Court held that any exclusion of the plaintiffs from participation in the Plan for purposes of avoiding the making of 1981 contributions to their accounts amounted to discrimination under 29 U.S.C. §1140, which provides:

> It shall be unlawful for any person to...discriminate against a participant...for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan....

The District Court noted that no cogent justification had been advanced for excluding the plaintiffs while they continued in the employ of Servus beyond the contribution date. (A. 31.)

The Court of Appeals, however, held that it was not "discriminatory for defendant to make voluntary Plan contributions to continuing employees [at the Illinois plant] to maintain their morale, but not to make such to departing [but not yet departed] employees of the admittedly profitless, wound-up, branch of its business." (A. 8.) The Court of Appeals found "no invidious intent" in a "termination that cuts along independently established lines—here separate divisions—and that has a readily apparent business justification...." (A. 7.)

The analysis of the Court of Appeals with respect to the issue of discrimination is flawed by the same lack of deference to the explicit terms of the Plan which was reflected in its analysis of the question of compliance with termination procedures. Section 3.2 of the Plan provided that "Every Employee" who met certain age and years-in-service requirements was eligible for participation. The Plan also provided that any employee who became a Plan participant would "continue as a participant in the Plan until his death, termination of employment, or retirement." (A. 15.) The Court of Appeals held that the Plan had been partially terminated—not amended—by the defendants. (A. 3-4.) The cited Plan provisions remained in force. Under the rules of construction discussed *supra*, the Court was bound strictly to construe these Plan provisions in favor of the employees and to avoid forfeiture of benefits. Had the Court of Appeals followed this course, as required by the federal case law previously cited, it would have observed the facts of this case in the following

context: On December 31, 1981, the contribution date for 1981, all of the plaintiffs were still employees of Servus meeting the Plan age and years-in-service requirements, as evidenced by their prior participation. They therefore continued to be eligible for participation in the Plan on that date under the cited Plan provisions. They did not voluntarily withdraw from participation. Yet participation in the company's 1981 contribution was denied to them by reason of the purported partial termination, unquestionably "interfering with the attainment of [a] right to which such participant[s] [became] entitled under the plan." 29 U.S.C. §1140.

The observation of the Court of Appeals that the company was profitless and had no obligation to make contributions to the profit-sharing plan is irrelevant. If the company chose to make such contributions anyway, as it did, it was obligated to make them for the accounts of *all* eligible participating employees. The statute requires no "invidious intent" as an element of the proscribed discrimination in such circumstances. The mere fact of the purposeful differential treatment of the plaintiffs with respect to the 1981 contribution despite their continued eligibility under the Plan documents, resulting in the withholding of rights accorded to other participants, is *per se* discrimination for the purpose of interfering with participant rights under the Plan. The Court of Appeals' gratuitous ascription of a morale-building motive for the contributions to the Illinois workers' accounts is similarly not germane to the question of whether the Chicopee workers were subject to discrimination for the purpose of interfering with the attainment of benefit rights to which they were entitled under the Plan. The question is not why the defendants continued to contribute to the Illinois workers' accounts, but simply whether they purposefully declined to provide the same benefits to Chicopee workers who also met Plan participation qualifications on the contribution date. It is not disputed that the Plan fiduciaries did so decline to provide benefits to the

plaintiff Chicopee workers, who were fully qualified as equal participants under the express, unamended terms of the Plan. Nothing more is needed to establish discrimination within the meaning of 29 U.S.C. §1140.

III. By Setting a Retroactive Termination/Valuation Date for Certain Employees, Without Authority in the Plan To Do So, and by Holding Plan Assets Allocable to Them Beyond That Date, the Employer Discriminatorily Applied the Earnings and Appreciation of Those Employees' Plan Accounts to the Benefit of Its Remaining Employees.

Even if invidious intent were required, it is not difficult to find on these facts. The defendant attempted an eleventh hour partial termination as the 1981 contribution date approached and it became obvious that some of the Chicopee members would still be employed into 1982. They established a retroactive termination date, despite the lack of any authority in the Plan to do so. (A. 10.) This factor introduced a further element of discrimination against the plaintiffs which the Court of Appeals failed to recognize. The Termination Date establishes not only the date after which no further contributions will be made, but also the Accounting Date for the valuation of the interests of the participants in the terminated portion of the Plan. (A. 16.) Payment is then made to such terminated participants based on the value of their accounts in the Plan *on the Accounting Date.* Participants in a partially terminated segment of the plan have no right to continue to share in the appreciation of plan assets or in their investment earnings beyond the Accounting Date, at which point their rights are frozen. The defendants in this case discriminatorily bent this fact to the advantage of the Illinois workers, by establishing the retroactive Accounting Date and holding the assets allocable to the plaintiffs in the fund, where they continued to appreciate in value and earn interest. The defen-

dants continued to hold the funds allocable to the plaintiffs' accounts even beyond the receipt of the favorable IRS ruling on January 26, 1982, finally disbursing payments on February 9, 1982. In the interim between the September 30, 1981, Accounting (Termination) Date and the payments made on February 9, 1982, the appreciation and earnings of the plaintiffs' share of the Plan funds and investments all accrued to the sole benefit of the Illinois workers who continued as participants in the Plan.[3] The Court of Appeals clearly failed to comprehend the potential for discrimination inherent in the setting of a termination date, which potential came to fruition in this case. To the contrary, the Court stated that "[t]he precise date [of termination] was of no significance," whether is was "in August, September, or when the Pension Committee voted in November." (A. 6.) Because of its lack of comprehension of the effects of an early termination date, it did not address the question of the lack of authority in the Plan for retroactive terminations, or the question of the discriminatory appropriation to the benefit of the Illinois workers of the earning power of the plaintiffs' Plan accounts during the four-plus months between the retroactive termination date and the distribution date.

Finally, it must be noted that the defendants could easily have established a termination date which would have assured the plaintiffs participation in the Plan up to their last day of employment. The Plan itself manifestly *required* the company to hold participation open to all employees who qualified for participation as the plaintiffs did. As Judge Coffin noted in his dissent, "the plaintiffs, at the time of receiving notice of termi-

[3] The "Special Plaintiffs' Accounting" prepared by the defendants in response to the Order of the District Court demonstrates the fact that assets allocable to the plaintiffs' accounts in the Plan produced earnings during the whole of 1981. See A. 50. Under the decision of the Court of Appeals however, earnings accruing after the retroactive termination date would be added to the Illinois workers' accounts, rather than to the plaintiffs' accounts which produced the earnings.

nation, had worked eleven months of the year—and thereby had contributed most of their year's work at the end of which they would expect the company's annual contribution." (A. 9-10.) The setting of the early termination date, and the absence of any cogent explanation being proffered therefor, established an irresistible implication (and a firm basis for the District Court finding) that the reason for the termination was avoidance of the necessity of making contributions on the Chicopee employees' behalf—a right to which the Chicopee participants were about to become entitled under the Plan. In these circumstances, the District Court's conclusion that the defendants had engaged in discrimination against the plaintiffs in contravention of 29 U.S.C. §1140 was correct and should not have been reversed by the Court of Appeals.

Conclusion

For the reasons set forth above, the plaintiffs, petitioners herein, respectfully request this Court to issue a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 83-1468

ELLIET N. ARONSON, ET AL.,

PLAINTIFFS, APPELLEES,

v.

SERVUS RUBBER, DIVISION OF CHROMALLOY, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S District Judge*]
[566 F.SUPP. 1545]

Before
COFFIN, ALDRICH and BOWNES,
Circuit Judges.

Jeffrey L. McCormick, with whom *Law Offices of Robinson Donovan Madden & Barry, P.C.* was on brief, for appellants.
Francis D. Dibble, Jr., with whom *Charles W. Danis, Jr.*, and *Bulkley, Richardson and Gelinas* were on brief, for appellees.

March 21, 1984

ALDRICH, *Senior Circuit Judge.* Nine plaintiffs, all former employees of Servus Rubber Division of Chromalloy American Corporation, hereinafter, sometimes, defendant, instituted this action under the Employee Retirement Income Security Act [ERISA], 29 U.S.C. § 1132, to recover benefits allegedly due them under defendant's profit sharing plan. The district court granted relief to all plaintiffs, and additional relief to plaintiff Aronson, and all defendants appeal.

Servus Rubber Division of Chromalloy is headquartered in Rock Island, Illinois, and during 1980 operated two plants, one in Chicopee, Massachusetts, known as the Vinyl Division, and one in Rock Island, where the rubber products were made. During 1980, Chromalloy expressed its intent to divest its Consumer Products Group, including Servus, as part of a general scheme of divestiture. On August 28, 1981, Chromalloy sold the assets of the Chicopee plant and immediately began laying off employees and winding up the business. Over one half of the 64 plan participants at the Chicopee plant left defendant's employ within a month, and by January 1, 1982, only eleven remained, including the nine plaintiffs. Throughout this time, business at Servus' Rock Island plant continued as usual.

The plan at issue is entitled "Servus Rubber Division of Chromalloy American Corporation Employees' Profit Sharing Plan," and originally encompassed employees at both plants. The plan is intended to comply with Internal Revenue Code and ERISA standards governing qualified employee benefit plans. Section 4.1, governing company contributions, states that prior to the end of each year, the company will decide, "in its sole discretion," the appropriate contribution for the year. Its only obligation in this regard is that, "to the extent there are net profits available, the Company shall contribute an amount equal to three per cent (3%) of the compensation of all participants." All qualified participants employed on December 31 are entitled to share in the contribution. However, under section 11.3 the company could amend the plan "at any time," and under section 12.1 terminate the plan and/or discontinue contributions, without limitation—unless effecting a discrimination. 29 U.S.C. § 1140. Upon the occurrence of a partial termination, the plan provided, in accordance with the Tax Code, 26 U.S.C. § 411(d), that all prior contributions to the terminated employees became 100% vested. At issue here are the rights to and in Servus' 1981 contributions.

Servus did not show a profit in 1981, and was, accordingly, under no obligation to contribute. It did, however, make a contribution equal to 8% of the yearly salaries of all participating employees at the Rock Island plant. It made none on behalf of the Chicopee employees, although plaintiffs were still in its employ on December 31, nor were they allowed to share in the contributions made, defendant claiming the plan was partially terminated or amended with respect to Chicopee. Plaintiffs disputed both of these contentions, adding that a partial termination as to them would have been discriminatory. The court found for plaintiffs, holding that defendant failed to take the proper action to accomplish either an amendment or a partial termination, and that, in any event, such a termination would have been discriminatory. This we reverse.

The vote on which defendant primarily relies is that of the Pension Committee, on November 25, 1981:

> RESOLVED, that the Servus Rubber Division of Chromalloy American Corporation Employees' Profit Sharing Plan be *partially terminated* with respect to those participants who were employees of the Servus Vinyl Division at the date of the announcement to close down that operation with the date of termination and valuation, as defined in the plan, be established as September 30, 1981, effective September 30, 1981,... (Emphasis suppl.)

This read, "terminated," not "amended." Defendant's problem arises from the fact that, while the Pension Committee had full power to amend the plan,[1] termination had to be by the company.[2]

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[1] 11.3 *Amendment.* The Company reserves the right to amend the Plan at any time by written resolution of the Pension Committee of Chromalloy American Corporation,.... Any amendment may, by its terms, be retroactive. Each amendment and the retroactive application thereof, if any, shall become effective upon delivery to the Trustees of a written instrument executed by the Company, setting forth the terms and provisions thereof.

[2] 12.1 *Event of Termination.* The Company, with the approval of the Pension Committee of Chromalloy American Corporation, reserves the

Defendant contends that, under the Treasury Regulations, a partial termination took place by operation of law, *see* 26 C.F.R. §§ 1.401-6(b), 1.411(d)-2(b), a matter which could raise considerable difficulties in some cases—*but cf. United Steelworkers of America* v. *Harris & Sons Steel Co., Inc.*, 3 Cir., 1983, 706 F.2d 1289, 1297-99—but which we need not reach. We hold the plan was adequately complied with.

Plaintiffs concede that defendant intended to partially terminate, but assert, first, that the termination provision, 12.1, ante, does not provide for partial terminations, and second, that defendant failed to comply with 12.1 in any event. As to the first, we note that the plan must be construed as a whole. Although it is true that section 12.1 only reserves the "right to terminate," its companion section, 12.2, requires 100% vesting "[u]pon...partial or complete termination." Manifestly both are comprehended in section 12.1.

Second, section 12.1's requirement of "approval of the Pension Committee" was met by the Committee's resolution. This not only contained appropriate language, but it is part of a document whose heading reads, "unanimous Written Consent of the Pension Committee." Nor, although plaintiffs seek to make much of it, can there be any doubt as to the intended date, in light of the language of this Resolution. Plaintiffs' contentions are reduced to saying that written notice thereof was not given to the trustees, and that, whereas the committee voted to terminate, it does not appear that the "Company" took action.

This last is an unsustained technicality. There is nothing in the plan requiring the company to manifest its action in any particular manner. In this case the scenario started with a letter to the individual participants, reading in part as follows.

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right to terminate the Plan and Trust, or to discontinue completely Company contributions, by giving written notice of the date of such termination or discontinuance, hereinafter referred to as the "Date of Termination", to the Trustee.

Dear Plan Participant:

The decision has been made to terminate the Servus Rubber Profit Sharing Plan as it relates to those participants at the Chicopee facility and to distribute the funds attributable to those participants.

An application is to be made to the Internal Revenue Service for a determination on this partial plan termination. Normally, the IRS review of a plan termination is completed in 90-120 days. Upon receipt of IRS approval the plan Trustees will take immediate action to distribute the account balances to these Chicopee participants.

Sincerely,

SERVUS RUBBER COMPANY

s/ DON TOBIN
President

s/ JOHN L. CARUSO
Vice President Finance.

Following this, an application for determination upon termination, executed by John L. Caruso, Vice President Finance, Servus Rubber Co., was filed with the IRS. In the pretrial stipulation plaintiffs agreed,

> 15. On November 12, 1982, *Chromalloy* submitted an Application for Determination Upon Termination to the Internal Revenue Service. A copy of this application on Form 5310 along with the documents submitted therewith is contained in the documentary appendix as Exhibit 8. (Emphasis suppl.)

Chromalloy is the Company. We cannot accept plaintiffs' post trial contention that the company was a stranger to the termination.

It is equally empty to charge that the "Trustee" did not receive written notice. There were, at the time, two trustees,

Tobin and Caruso. It should be enough that they signed the original notification of termination as president and vice president of Servus, respectively. Nor could they have been unaware of the subsequent requested consent, and the response of the Pension Committee, ante. And, finally, Caruso signed the Company's notification to the IRS. No greater compilation of documents was required. *Cf. Kappel* v. *United States*, W.D.PA., 1974, 369 F.Supp. 267, 275.

Our dissenting brother complains that we are elevating substance over form, a criticism we reject only because we believe the deficiencies so minor. Form can be important, but we see nothing here that seems of moment. True, it does not appear that both trustees were given the date of partial termination in writing, but this is hardly a case warranting doubts, or requiring speculation as to the trustees' knowledge that partial termination was approved. The precise date was of no significance. Whenever the termination could be said to have occurred, whether in August, September, or when the Pension Committee voted in November, it was before plaintiffs had qualified to share in any contribution.

There remains plaintiffs' allegation that they were discriminated against, in violation of 29 U.S.C. § 1140.[3] This is a misreading of a section which relates to discriminatory conduct directed against individuals, not to actions involving the plan in general. The problem is with the word "discriminate." An overly literal interpretation of this section would make illegal any partial termination, since such terminations obviously interfere with the attainment of benefits

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[3] "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act . . . ." 29 U.S.C. § 1140.

by the terminated group, and, indeed, are expressly intended so to interfere. Such cannot be the intent of the section, where the statute expressly recognizes partial terminations. *See* 29 U.S.C. § 1343(b)(4) (incorporating Tax Code definitions, 26 U.S.C. § 411(d)(3)). This is not to say that a plan could not be discriminatorily modified, intentionally benefitting, or injuring, certain identified employees or a certain group of employees, but a partial termination cannot constitute discrimination per se. A termination that cuts along independently established lines—here separate division—and that has a readily apparent business justification, demonstrates no invidious intent.

Nor can discrimination be established merely because the termination falls unevenly on employees who remain employed for differing lengths of service in connection with winding up a business. Such events are expressly anticipated in the regulations.[4] The case at bar is a typical example. Under the terms of the plan, from the beginning, the great number of the employees, discharged in November or earlier, could receive no benefits for the year 1981. In this there would be no possible impropriety. Plaintiffs' claim for benefits is based on the fact that they remained until January, viz., after the accounting date December 31, 1981. If they were to receive benefits, it would be for the entire year, full benefits for 12 months as against no benefits whatever for the others, although the others had been employed most of the year. If one is to talk discrimination, plaintiffs are seeking discrimination in their favor when nothing separates them from the others but a few weeks employment, and the plan, with the business, is being terminated. We adhere to what was said in the regulation.

Nor can plaintiffs claim they were discriminated against with respect to participants in defendant's Rock Island opera-

[4] "For example, a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees." 26 C.F.R. § 1.401-6(b).

tion that was not being closed down. The dissent asserts that Chicopee and Rock Island were but two plants, not "two divisions of a company, nor . . . two branches." This would seem but semantics; they were not only widely separated, but engaged in different production. More important, one was sold, the other was not. This was a profit sharing plan; with no profits the company had no obligation to contribute. We cannot regard it as discriminatory for defendant to make voluntary contributions to continuing employees to maintain their morale, but not to make such to departing employees of the admittedly profitless, wound-up, branch of its business. We hold the plan was validly terminated, and there are no 1981 benefits due any plaintiff.

In Count 2 plaintiffs Aronson and Crivelli sue on contracts to award them special severance pay for a stated number of months, plus "fringe benefits." These contracts arise from letters sent by defendant to these two plaintiffs, early in 1981. Plaintiffs claim that "fringe benefits" included regular contributions to the pension plan. Unaccountably, defendant offered no evidence of anything else that might be so regarded. Under such circumstances it was only natural for the court to adopt plaintiffs' construction. There is a difficulty, however. Aronson was the highest paid, and Crivelli one of the highest paid, employees of the vinyl facility. To include them specially in the pension plan, to the exclusion of all lesser paid employees, would seem exactly the type of preferential discrimination that the Tax Code prohibits, and that could affect the tax-exempt status of the plan. *See* 26 U.S.C. § 401(a)(4) & (5); *Cornell-Young Co.* v. *United States*, 5 Cir., 1972, 469 F.2d 1318, 1323-25. We decline to construe the letters as effecting such a change here.

This does not mean that defendant is to escape altogether its promised obligations. There is no reason why it should not be charged with paying plaintiffs the dollar amounts directly that it undertook to pay into the plan on their behalf. This means

that Crivelli should be paid 8% of his 1981 salary. Aronson was promised severance pay through 1982. Consequently, in addition to his promised 1982 salary, he should receive both the 8% 1981 contribution, and the amount of whatever, if any, would have been contributed to the plan in 1982 in his behalf had he been a participant. This, however, is a contract, and not an ERISA recovery, and while there is pendent jurisdiction, there is no basis for the statutory award of counsel fees.

Aronson and Crivelli have failed to prove any other undertaking falling within the meaning of fringe benefits. The judgment of the district court is vacated; judgment to be entered for Aronson and Crivelli in accordance with this opinion,[5] but in all other respects, judgment for defendants.

COFFIN, *Circuit Judge* (dissenting). I view the issue before us as one where insistence on at least substantial compliance with detailed requirements is amply justified by the nature of the problem, the intent of the relevant legislation, and the difficulties created by elevating substance over form. On this record, involving a mixed question of fact and law, I cannot say that the district court committed clear error (if error at all), *Lynch* v. *Dukakis*, 719 F.2d 504, 513 (1st Cir. 1983), and would affirm.

I begin by observing that the decision was not directed to one of two divisions of a company, nor to one of two branches. It was aimed at one of two plants of one division of a company. I therefore approach the case much as if the purported termination concerned the workers in one of two buildings. When I reflect in addition that the plaintiffs, at the time of

[5] It is not clear from the record, including the court's order, whether, on remand, defendant Servus Rubber Division or, possibly, defendant Chromalloy American Corporation, is the one against whom this money judgment should run.

receiving notice of termination, had worked eleven months of the year—and thereby had contributed most of their year's work at the end of which they would expect the company's annual contribution—I do not think it unrealistic to expect a presumably well advised employer to adhere with some care to its own plan.

Here, of course, no case can be made that the company amended the plan. The court properly does not rest on any retroactive amendment. Instead, it rests on a partial termination. In so doing, I fear it strains unduly. It finds authority in the mention of the words "partial...termination" in a 1976 plan amendment to a provision other than section 12.1, which creates the basic right to terminate. Moreover, although section 11.3 explicitly provides for retroactive amendments, section 12.1 is silent not only as to partial terminations but as to retroactive ones. Absent some authority for retroactive effect similar to that covering amendments in section 11.3, I question the validity of such terminations.[1] The court, however, assumes that "written notice of the date of...termination" can be given, although the date has long since passed into history.

Section 12.1 clearly identifies three ingredients of a legal termination: a company exercise of the right to terminate, approval by the Pension Committee, and the giving of written notice of the date of termination to the Trustee. Here we see an undated company letter announcing its decision to terminate the plan subject to an Internal Revenue Service determination, signed by the President and Vice President Finance of Servus Rubber Company. The stipulation tells us only that this was distributed "[s]ometime subsequent to August 28, 1981". This letter gave no indication of a date of termination. On November 12, 1982 the company submitted its applica-

[1] The district court found no basis in the Internal Revenue Code, regulations, or interpretative rulings for applying partial termination to workers kept on long after the termination date "especially where that date and an attendant accounting or valuation date are established retroactively".

tion signed by its president, to Internal Revenue Service. As the district court noted, the application did not indicate that the termination would be "partial" or that the Plan would continue in existence.[2] Some two weeks later, on November 25, 1981, the Pension Committee voted the partial termination, to be effective as of September 30, 1981.[3]

As of November 25, 1981, therefore, the evidence consists of an undated letter of decision to terminate, with no date of termination, sent to participants at some unknown time, followed by a generalized application to the Internal Revenue Service, and purported retroactive approval of the partial termination by the Pension Committee. But even if we blink at all other deficiencies, we face the further fact that at no time has there been compliance with section 12.1's requirement of "written notice of the date of such termination...to the Trustee".

The court sees the absence of such written notice as cured by the happenstance that the "Trustee" consisted of the two company officers who originally had notified the plan participants that there had been a decision to terminate. The court adds that these officers could not have been unaware of the Pension Committee's subsequent resolution. My problem with this "commonsense" approach, based on assumptions as to who knew what and when, is that it invites litigants and courts to consider the adequacy of conduct not conforming to the plan and to determine what may be accepted as a satisfactory equivalent. For example, had there been no written evidence

[2] In January of 1982, Internal Revenue Service replied, stating that "termination of this plan does not adversely affect its qualification for federal tax purposes".

[3] Even evidence of this action fails to conform with section 14.2 of the plan which requires that "Any action by the Company pursuant to any of the provisions of this plan shall be evidenced by a copy of a resolution of the Pension Committee of Chromalloy American Corporation, certified by its Secretary or Assistant Secretary." What is before us, as an exhibit to the stipulation, is a copy of a resolution signed by the three members of the Pension Committee, but lacking any certification.

of a company decision at all, a court might sensibly find that the company officers-trustees met daily with members of the Pension Committee and surely must have known of the Committee's approval. By the same token, amendments would be susceptible to similarly informal proof. The result would surely be infinitely complex if not unworkable.

The outcome in this case seems to me quite at odds with the terms and policy of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, which place a premium on the scrupulous administration of pension plans. Section 1104 of ERISA, for instance, requires plan trustees to discharge their duties "in accordance with the documents and instruments governing the plan...." 29 U.S.C. § 1104(a)(1)(D). Section 1104 was enacted in evident response to Congress's concern about "the conduct of administration and operations of pension plans", H.R. Rep. No. 93-533, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4645, and was intended to "place a...duty on every fiduciary...to act...in accordance with the documents and instruments governing the plan....", *id.* at 4651. What we said, pre-ERISA, in *Hoefel* v. *Atlas Tack Corp.*, 581 F.2d 1, 7 (1st Cir. 1978), seems to be as valid today: "Where the employer establishes the terms of a pension plan, those terms should be construed in favor of the employee."

I would affirm the judgment.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 82-0177-F

ELLIET N. ARONSON, ET AL.,
PLAINTIFFS,

v.

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, ET AL.,
DEFENDANTS.

MEMORANDUM, FINDINGS OF FACT, AND CONCLUSIONS OF LAW
MAY 19, 1983

FREEDMAN, D.J.

Plaintiffs brought this action in May 1982 seeking declaratory and injunctive relief. Upon the filing of the verified complaint and a supporting affidavit, plaintiffs applied *ex parte* for a temporary restraining order ("TRO") enjoining the defendants from terminating or distributing the assets of the Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Plan and Trust. The Court allowed the application and the TRO was entered on May 13, 1982. The TRO was extended upon plaintiffs' application on May 21, and thereafter following plaintiffs' motion for a preliminary injunction, the Court allowed extension upon plaintiffs' application with defendants' assent. On September 2, 1982, the Court allowed plaintiffs' motion to extend the TRO until the entry on the merits of this case, which motion had also been assented to by defendants.

The Court consolidated the hearing on plaintiffs' motion for preliminary injunction with a trial on the merits. At trial, the

parties submitted a detailed stipulation of facts and accompanying set of documents as exhibits. Two witnesses testified for plaintiffs, and one witness testified for defendants. At the close of the evidence, the Court instructed the parties to submit proposed findings of fact and conclusions of law, and upon receipt of these submissions took the case under advisement.

Herein the Court sets forth its Findings of Fact and Conclusions of Law, F.R.Civ.P. 52(a).

II. FINDINGS OF FACT

A. *Parties*

1. The plaintiffs in this action are Elliet N. Aronson, Lucia B. Browning, Noe Cordeiro, Lawrence Crivelli, Richard Giguere, Robert Goldman, Walter Harubin, Hugo Tietze, and John Zielinski. All nine plaintiffs are former employees of the defendant Chromalloy American Corporation ("Chromalloy"), having worked in the Servus Rubber Division of Chromalloy at its facility in Chicopee, Massachusetts. Further, all nine plaintiffs were participants in the defendant Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Plan ("the Plan") as of December 31, 1980.

2. The defendant Plan is a profit-sharing plan as defined in Section 401(a) of the Internal Revenue Code of 1954, as amended, and the regulations promulgated thereunder and is an employee benefit plan as defined in Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2). The Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Trust ("the Trust") was established pursuant to the Plan.

3. The defendant Chromalloy is a Delaware Corporation with its principal place of business at Chromalloy Plaza, 120 South Central Avenue, St. Louis, Missouri. Chromalloy, acting through its Servus Rubber Division ("Servus") was at all times pertinent to this action Administrator of the Plan until May 14, 1982.

4. The defendant Donald Tobin was a Trustee for the Plan and President of Servus until May 14, 1982, with his office located at 1136 Second Street, Rock Island, Illinois. The defendant John Caruso was a Trustee for the Plan and Vice-President of Servus until May 14, 1982, with offices located at 1136 Second Street, Rock Island, Illinois.

B. *The Plan and Trust*

5. The Plan stated in its introductory section that its purpose was "to provide additional incentive and retirement security for eligible employees . . . by permitting them to share in the profits of the Company." Section 3.5 of the Plan provided *inter alia* that "[e]very Employee who becomes a Participant shall [subject to conditions not relevant here] continue as a Participant in the Plan until his death, termination of employment, or retirement."

6. Section 4.1 of the Plan obliged Chromalloy to make a contribution to the Plan only out of the net profits of Servus for that year, or out of accumulated earnings and profits of prior years. However, defendant Caruso testified that as a matter of practice, Chromalloy made contributions irrespective of the profitability of Servus in any particular year. Contributions to the Plan were allocated *pro rata* to each participant in the Plan based on the compensation of each participant for the year in question. Plan, Section 4.5. The allocation formula was succinctly set forth in a Summary Plan Description as follows:

> Your share is determined by dividing your compensation (excluding bonuses and 35% of the compensation to salesmen, less bonuses) during the plan year by the total compensation (excluding bonuses and 35% of compensation to salesmen, less bonuses) of all participants and multiplying the result by the company's contributions.

Summary Plan Description at p. 5.

7. The Plan in Section 2.1(g) defined its accounting date as "12/31" (December 31) and in Section 5.2(b) provided that

each year's contributions would be allocated and credited to each participant's account on the accounting date. The Summary Plan Description stated:

> Company contributions are divided among members of the plan who are with the company on December 31 of the year for which the contribution is made. You must be employed on December 31 to receive any part of the company contribution for the plan year ending on that date.

Summary Plan Description at p. 5.

8. Section 12.1 of the Plan provided in part as follows:

> The Company, with the approval of the Pension Committee of Chromalloy American Corporation, reserves the right to terminate the Plan and Trust, or to discontinue completely Company contributions, by giving written notice of the date of such termination or discontinuance. . . to the Trustee.

Section 12.2 stated that:

> Upon the partial or complete termination of the Plan or Trust, or in the event of complete discontinuance of the Company's contributions, the date thereof being called the "Date of Termination," each participant affected by the partial or complete termination shall be entitled to one hundred per cent of his account in Trust anything hereinabove to the contrary notwithstanding, determined on the Date of Termination as if such date were an Accounting Date.

9. The Plan reserved the right in Servus to amend the plan at any time by written resolution of the Pension Committee of Chromalloy Corporation, "including but not limited to, the right to change the amount or method of determining Company contributions," Plan, Section 11.3, and provided that "[a]ny amendment may, by its terms, be retroactive. Each amendment and the retroactive application thereof, if any,

shall become effective upon delivery to the Trustee of a written instrument executed by the Company, setting forth the terms and provisions thereof." *Id.* In like fashion, Section 10.1 of the Trust provided that "The Company, by resolution of the Pension Committee of Chromalloy American Corporation, reserves the right to amend the Plan or Trust at any time, and from time to time.... Each amendment and the retroactive effect thereof, if any, shall become effective upon delivery of a written instrument setting forth its terms and provisions, and executed by the appropriate representatives of the Company, to the Trustee."

C. *Servus*

10. Prior to being acquired by Chromalloy in 1970 and becoming a division thereof, Servus was an independent corporation with a principal place of business in Rock Island, Illinois. As of December 30, 1980, Chromalloy operated two manufacturing facilities as part of Servus: one facility was located at 1195 Montgomery Street, Chicopee, Massachusetts; and the other at 1136 Second Street, Rock Island, Illinois. Servus manufactured and sold footwear, most notably boots. The Chicopee facility manufactured and sold vinyl products, primarily winter boots for the consumer market, but some boots suited to industrial use were also made there. The Rock Island facility made and marketed a variety of rubber boots including heavyweight boots suited to industrial, firefighting, and sporting applications. Because the Chicopee facility manufactured and sold vinyl products, it was commonly referred to as Servus Vinyl Division. However, the two facilities were not separate business entities, but were rather two components of the single division Servus within Chromalloy.

11. Servus ran sales operations at both facilities, and sales personnel at the Rock Island facility sold products manufactured at the Chicopee facility. The 1981 sales catalog of the Rock Island facility advertised products manufactured in

Chicopee. Payroll checks for employees at the Chicopee facility were computed at the Chicopee facility but were obtained from the Rock Island facility, drawn on the First National Bank of Rock Island, and bore the address of the Rock Island facility and the facsimile signature of John Caruso. During the end of the year 1981, payroll functions were managed entirely from the Rock Island facility.

12. Plaintiff Aronson was Executive Vice-President of Servus and his duties required that he occasionally travel to the Rock Island facility.

13. There were 168 participants in the Plan on December 31, 1980, of whom 93 were employed at the Rock Island facility, and 75 were employed at the Chicopee facility. As noted previously, each of the plaintiffs was an employee of Chromalloy at the Chicopee facility and a participant in the Plan on December 31, 1980.

D. *Sale of Chicopee Facility*

14. In its 1980 Annual Report, Chromalloy expressed its intent to continue a general program of divestiture to strengthen its financial position. This disclosure of intent comported with divestiture plans about which plaintiff Aronson had been informed by defendant Tobin and executives of Chromalloy's Consumer Products Groups, specifically, that Chromalloy planned to divest itself of Servus as part of a divestiture of its Consumer Products Group. Aronson expressed to Chromalloy personnel his interest in acquiring the Chicopee facility, but Chromalloy personnel indicated that Chromalloy desired to sell both the Rock Island and Chicopee facilities together. Nonetheless, on August 28, 1981, Chromalloy sold a substantial part of its assets in the Chicopee facility of Servus to Preview Products of Manchester, New Hampshire. Aronson and other executive personnel at the Chicopee facility were informed of the sale by Tobin on August 29. Tobin advised Aronson to report to work on the following Monday to begin actual shut down procedures at the Chicopee facility.

15. On August 31, 1981, departmental managers and the union representative were informed of the sale and instructed that the facility would be closed and layoffs would begin immediately. In the course of the next ten days, work in progress was completed.

16. There were approximately 350 employees at the Chicopee facility on August 29, 1981, most of whom were union employees not covered by the Plan. Of the 68 non-union personnel employed at the Chicopee facility on that date, 64 were participants in the Plan. By September 30, 1981, 29 non-union employees remained, of whom 27 were participants in the Plan. As of October 31, 1981, 22 non-union employees remained; on November 30, 1981, 18 non-union employees remained; and on December 31, 1981, 11 non-union persons were employed at the Chicopee facility. In contrast, on September 30, 1981, 83 non-union persons were employed at the Rock Island facility, 72 of whom were participants in the Plan, and on December 31, 1981, 84 non-union persons were employed there, of whom 71 were participants in the Plan.

17. Each of the plaintiffs was employed at the Chicopee facility on December 31, 1981 and had been employed there for the entire year 1981. Each plaintiff was physically present and working at the facility on December 31, 1981. The employment of plaintiffs Aronson, Giguere, and Harubin terminated on January 1, 1982. The employment of plaintiffs Browning, Cordeiro, Crivelli, Goldman, Tietze, and Zielinski ended on January 8, 1982.

18. During the shut down procedures of the Chicopee facility during September through December 1981, Tim Evans, Controller of Chromalloy's Industrial Products Group, visited the Chicopee facility almost weekly from his principal office in St. Louis, Missouri, to oversee the closing of the facility. While Evans and Aronson discussed periodically which employees should remain, Evans had the final decision on this and other matters involved in the shut down of the facility.

19. Employees at the Chicopee facility received severance pay equal to one week of current salary for each year employed. Aronson testified that Evans stated during the shut down period that a condition of receiving this severance benefit was that an employee not leave his or her employment before Chromalloy determined that the employee's services were no longer needed.

E. *Compensation of Plaintiffs in 1981*

21.[a] The individual plaintiffs received compensation, as defined in Section 2.1(w) of the Plan, during the year 1981 as follows:

Elliet N. Aronson	$65,524.56
Lucia B. Browning	11,700.00
Noe Codeiro	14,031.24
Lawrence Crivelli	23,400.00
Richard Giguere	18,922.53
Robert Goldman	21,308.26
Walter Harubin	23,000.12
Hugo Tietze	17,136.60
John Zielinski	17,072.89

The following amounts were paid to two of the plaintiffs on account of vacation time accrued during 1981:

Elliet N. Aronson	$5,673.13
Lawrence Crivelli	900.00

As a matter of practice, amounts paid for vacation time accrued were included in calculating total compensation of an individual participant under the Plan.

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[a] No paragraph numbered "20" appears in the District Court opinion.

F. *Discussions Concerning Contributions, Communications with the Internal Revenue Service, and Resolution of the Pension Committee of Chromalloy*

22. During the period September through December 1981, plaintiff Aronson had numerous conversations with different employees of Chromalloy concerning the Plan and what participants in the Plan might be receiving as a contribution at the end of the year 1981. Aronson discussed the subject on numerous occasions with defendant Trustees Caruso and Tobin, with Tim Evans, and with Alistair W. Clubb, Vice-President of Personnel and Administration, and expressed his belief that persons who were participants in the Plan and who worked through the end of the year 1981 at the Chicopee facility should receive their *pro rata* allocated share of any contribution made to the Plan. No one among the personnel with whom Aronson discussed the subject indicated that any participant employed at the Chicopee facility would share in any contribution. Rather, the Trustees Tobin and Caruso indicated that the matter was not in their hands; Evans stated that a decision had been made that Chicopee employees would not share in any contribution; and Clubb, in November 1981 answered Aronson's telephonic inquiry by stating that application had been made to the Internal Revenue Service ("IRS") for a partial termination of the Plan. Sometime subsequent to August 28, 1981, the participants in the Plan employed at the Chicopee facility, including each of the plaintiffs, received a letter from Chromalloy signed by defendants Tobin and Caruso in their capacities as President and Vice-President of Finance, respectively, of Servus. The undated letter stated in pertinent part as follows:

> The decision has been made to terminate the Servus Rubber Profit-Sharing Plan as it relates to those participants at the Chicopee facility and to distribute the funds attributable to those participants.

> An application is to be made to the Internal Revenue Service for a determination on this partial plan termination. Normally, the IRS review of a plan termination is completed in 90-120 days. Upon receipt of IRS approval, the Plan Trustees will take immediate action to distribute the account balances to these Chicopee participants.

23. Chromalloy did in fact submit an Application for Determination Upon Termination to the IRS on November 12, 1981. This Application did not specifically indicate that the termination would be "partial" or that the Plan would continue in existence. The Application set forth a termination date of September 30, 1981, and in answer to the printed inquiry "Reason For Termination" stated "Plant Liquidation." There was no indication that employees in Servus would continue to be employed beyond the Plan year end of December 31, 1981.

24. The Pension Committee of Chromalloy, which was made up of three non-Servus employees of Chromalloy, adopted the following resolution on November 25, 1981:

> Resolved, that the Servus Rubber Division of Chromalloy American Corporation Employee's Profit-Sharing Plan be partially terminated with respect to those participants who were employees of the Servus Vinyl Division at the date of the announcement to close down that operation with the date of termination and valuation, as defined in the plan, be established as September 30, 1981....

This resolution was one of many resolutions adopted by the committee concerning various plans and trusts covering divisions within Chromalloy.

25. Chromalloy received from the IRS a determination letter with respect to the Plan dated January 21, 1982, which stated in pertinent part as follows:

> We have considered the information you sent us and have determined that your termination of this plan does not

adversely affect its qualification for federal tax purposes. Please note that this is not a determination regarding the effect of other federal or local statutes.

G. *Contributions and Trust Assets*

26. Chromalloy made a contribution in the amount of $112,075.44 under the Plan on behalf of participants in the Plan employed at the Rock Island facility on December 31, 1981; this contribution was equal to eight percent (8%) of a computation in accordance with the Plan based on the compensation of each such participant. No allocation of this contribution and no other contribution has been made on behalf of any of the plaintiffs or on behalf of any other person employed by Chromalloy at the Chicopee facility on December 31, 1981.

27. The assets of the Trust were $1,009,793.00 on September 30, 1981 and were $1,171,215.75 in December 1981.

H. *Letters to Aronson and Crivelli*

28. On or about March 1, 1981 plaintiff Aronson received a letter dated February 27, 1981 signed by the defendant Tobin in his capacity as President of Servus. The letter discussed the possibility of divestiture, Chromalloy's concern that the operations of Servus remain as efficient and profitable as possible until divestiture might be completed, and the need for key personnel to remain in place. The letter stated in pertinent part as follows:

> In an effort to alleviate your major concern, Chromalloy will assure the individual who remains and functions in his position up to the point of a completed divestiture, that he will be granted the following considerations:
>
> 1. All reasonable efforts will be made to secure his continuing employment with the purchaser.
> 2. If through no fault of his own his position is lost due to the divestiture, then Chromalloy would guaran-

tee him up to twelve (12) months of salary and fringe benefits to cover a period sufficient to regain a similar new position.

3. Once re-employment occurs, the severance payments would cease.
4. If he accepts a position at a salary lower than that paid to him at Chromalloy, the difference would be paid by Chromalloy for the remaining balance of the twelve-month period.

29. On or about March 1, 1981, plaintiff Crivelli received a letter dated February 27, 1981 from Chromalloy signed by defendant Tobin in his capacity as President of Servus. This letter was similar to the letter to Aronson, except the guarantee of salary and fringe benefits was for a period of six months. Subsequently, on or about October 29, 1981, Crivelli received a letter dated October 27, 1981, from Chromalloy signed by Tim Evans in his capacity as Controller of Chromalloy's Industrial Products Group. This letter amended the February 27 letter to Crivelli "with reference to severance pay," and stated that "[t]his amendment will guarantee you six months of salary upon the completion of the liquidation of the Servus Vinyl Division regardless of future employment."

30. Plaintiff Aronson as of November 1982 had been unemployed since the termination of his employment by Chromalloy.

I. *Miscellaneous*

31. On May 14, 1982, counsel for plaintiffs caused a copy of the complaint in this action to be served upon the Secretary of Labor and upon the Secretary of Treasury by certified mail, return receipt requested.

III. CONCLUSIONS OF LAW

1. Subject matter jurisdiction lies pursuant to the jurisdictional provisions of ERISA, 29 U.S.C. § 1132(e),(f). Plaintiffs have complied with the service requirements of 29 U.S.C. § 1132(h), and venue is proper in this district. *Id.*, § 1132(e)(2), *Varsic* v. *United States District Court for the Central District of California*, 607 F.2d 245, 248 (9th Cir. 1979). To the extent plaintiffs Aronson and Crivelli advance non-ERISA claims, subject matter jurisdiction exists under the principles of pendent jurisdiction.

2. ERISA provides that "a civil action may be brought (1) by a participant... (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan"; 29 U.S.C. § 1132(a)(1)(B), and "by a participant... (A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan...," *id.*, § 1132(a)(3). The plaintiffs are within ERISA's definition of "participants," 29 U.S.C. § 1002(7), and allege that the defendants have failed to pay benefits due plaintiffs, and have violated the terms of ERISA and the Plan. The Plan is an "employee pension benefit plan" within the meaning definition of ERISA, 29 U.S.C.§ 1002(2), to which the provisions of ERISA apply. 29 U.S.C. § 1003(a)(1). The defendant Chromalloy as administrator of the Plan, 29 U.S.C. § 1002(16), and the defendant trustees Tobin and Caruso are fiduciaries within the meaning of 29 U.S.C. § 1002(21)(A). *See also Freund Marshall & Ilsley Bank*, 485 F.Supp. 629, 635 (W.D. Wisc. 1979).

3. ERISA requires that:

> A fiduciary shall discharge his duties with respect to a plan solely in the interests of participants and beneficiaries and—

(A) for the exclusive purpose of:
  (i) providing benefits to participants and their beneficiaries; and
  (ii) defraying reasonable expenses of administering the plan;

(B) ....

(C) ....

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [the provisions of ERISA].

29 U.S.C. § 1104(a)(1).

4. ERISA further provides that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or] ERISA, ..., or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or ERISA]....
>
> 29 U.S.C. § 1140.

5. Plaintiffs advance three distinct theories of recovery, two of which support the claims of all nine plaintiffs, and one of which suggests a separate contractual right to "fringe benefits"—including profit-sharing plan benefits—on the part of plaintiffs Aronson and Crivelli. The two ERISA claims may be summarized as follows: first, that the Resolution adopted by the Pension Committee of Chromalloy purporting to terminate partially the Plan and establish a valuation date of September 30, 1981 as to the participants at the Chicopee facility was ineffective; second, that even if the Resolution was effective, such termination and establishment of a new accounting date unlawfully discriminated against plaintiffs as participants in the Plan employed at the Chicopee facility on December 31, 1981.

6. Defendants contend that the partial termination and establishment of a valuation date of September 30, 1981 were undertaken in accordance with the terms of the Plan and effective as a retroactive partial termination, "by appropriate amendment or otherwise...." Defendant's Post-Trial Memorandum at 14. Further, defendants argue that the plaintiffs' evidence fails to establish discrimination against plaintiffs. Finally, defendants urge that the term "fringe benefits" as used in the letters to Crivelli and Aronson cannot be construed to incorporate profit sharing plan contributions.

7. Turning first to plaintiffs' contentions concerning the ineffectiveness of the Resolution, the Court notes that the Resolution on its face makes no specific mention of amending the Plan. Further, while defendants correctly point out that the Plan in Section 11.3 allows for the retroactive effect of amendments, that same section states that: "Each amendment and the retroactive application thereof, if any, shall become effective upon delivery to the Trustee of a written instrument executed by the Company, setting forth the terms and provisions thereof." There is no evidence that this amendment procedure was followed in this case. Indeed, although defendants contend that notice, apparently of some sort, to the Trustees must have taken place because not only did defendant Caruso sign the Application for Determination Upon Termination submitted to the IRS, but also both Trustees (Caruso and Tobin) signed the letter sent to all participants employed at the Chicopee facility, nonetheless it is manifest that the Resolution of the Pension Committee of Chromalloy made no reference to which particular sections of the Plan were being amended by deletion and insertion. Under these circumstances, the court concludes that the Resolution of the Pension Committee of Chromalloy dated November 25, 1981, cannot be construed as an effective amendment to the Plan.

8. Defendants argue that Section 12.1 of the Plan authorized termination without the need for amendment. While Sec-

tion 12.2 of the Plan as amended effective January 1, 1976, makes reference to partial termination in the context of each participant's entitlement to one hundred percent of his account in trust upon the date of termination as if it were an accounting date, the specific termination provisions set forth in Section 12.1 of the Plan refer to the right reserved to Servus with the approval of the Pension Committee of Chromalloy and written notice of the termination to the Trustee to terminate the Plan and the Trust. Although defendants correctly point out that the Plan and Trust could have been terminated completely, if accomplished in accordance with the Plan's provisions, it does not follow as defendants suggest that the Pension Committee of Chromalloy by resolution could partially terminate the Plan in 1981 so long as requisite minimum participation standards were not violated. The Plan makes no reference to partial termination of the Plan with respect to some employees but not others, and even if the right to terminate partially were implicit in the reserved right to terminate completely, still the Plan does not provide for either complete or partial termination to be effective merely by resolution of the Pension Committee of Chromalloy.

9. Defendants cite tax regulations concerning termination of plans qualified under the Internal Revenue Code in support of their position that the partial termination was effective. These regulations provide in part as follows:

> (b) *Termination defined.* (1) Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer begins to discharge his employees. . . .

26 C.F.R. § 1.401-6(b)(1);

> (2) For purposes of this section [26 C.F.R. § 1.401-6], the term "termination" includes both a partial termina-

> tion and a complete termination of a plan. Whether or nor a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer will be determined on the basis of all the facts and circumstances. Similarly, whether or not a partial termination occurs when benefits or employee contributions are reduced, or the eligibility or vesting requirements under the plan are made less liberal, will be determined on the basis of all facts and circumstances. . . .

Id., § 1.401-6(b)(2). Defendants refer to a series Revenue Rulings applying these regulations, the most analogous of which is Rev. Rul. 81-27, 1981-4 I.R.B. 12 (superseding Rev. Rul. 72-510). The facts in this ruling involved an employer who had "established a qualified defined benefit plan that covered employees in the two divisions of its business. At a time when the plan covered 165 employees, the employer closed down one division. In connection therewith, the services of 95 participants were terminated." *Id.* On the facts presented, the IRS ruled as follows:

> In this case, a significant number of employees who had been covered under the employer's pension plan were discharged in connection with the winding up of a part of the employer's business.
>
> Accordingly, there was a partial termination of the plan within the meaning of Section 411(d)(3) of the [Internal Revenue] Code [26 U.S.C. § 411(d)(3)].
>
> This holding would apply irrespective of whether the significant decrease in participation in the plan was the result of adverse economic conditions or causes within the control of the employer.

Id.

10. Defendants argue that "[b]ased on the above-mentioned regulations, the pertinent sections of the Internal Revenue Code, and the interpretations of the above found within the pertinent Revenue Rulings, it is clear that a partial termination of a plan will occur merely if a significant number or percentage of employees are excluded from participation in the plan by reason of discharge of employment, without the need for amendment of the plan.... Thus, a partial termination of a plan can in fact take place even though all of the participants are not discharged." Defendants' Post-Trial Memorandum at 8-9.

11. However, defendants' reliance on the cited provisions of the Internal Revenue Code, the regulations promulgated thereunder, and the Revenue Rulings is misplaced. An effective partial termination cannot be said to have occurred in this case merely because tax law governing qualified plans requires that upon partial termination "the rights of all affected employees to benefits accrued to the date of such...partial termination..., to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable." 26 U.S.C. § 411(d)(3). Nothing in the statute, regulations, or interpretative rulings requires that partial termination of a plan due to discharge of a significant number of employees be extended to employees who actually continue to be employed well beyond the date of partial termination, especially where that date and an attendant accounting or valuation date are established retroactively. While the cited law suggests that the exclusion of participants who continue to be employed after a significant number of employees have been discharged might lawfully be accomplished by appropriate amendment to a plan, the Court has determined that no such amendment occurred here.

12. Further, the determination of the IRS in response to the application submitted does not foreclose plaintiffs' recovery. The determination letter of February 15, 1982 itself

expressly limits the scope of its ruling, and given the very limited information submitted to the IRS in connection with the Application for Determination Upon Termination, the IRS letter can hardly be considered a definitive administrative ruling entitled to judicial deference.

13. Thus, the Court concludes that no partial termination of the Plan took place with respect to the nine plaintiffs until the termination of their individual employment on January 1 or 8, 1982. Since plaintiffs were employed on December 31, 1981, they were entitled under the Plan's terms as participants to a contribution or an allocation of a contribution on their behalves on December 31, 1981 on the same *pro rata* basis as other participants. The failure of defendants to make such contribution or allocation of contribution violated the terms of the Plan and thus their fiduciary duties under 29 U.S.C. § 1104(a)(1)(A) and (D).

14. Alternatively, the Court concludes that even if the Resolution of the Revision Committee of Chromalloy could be construed to have amended the Plan effectively, nevertheless the exclusion of plaintiffs from participation in the Plan for purposes of the contribution for 1981 constituted discrimination against plaintiffs for the purpose of interfering with the attainment of plaintiffs' rights as participants in the Plan in violation of 29 U.S.C. § 1140. Defendants have offered no cogent justification for terminating plaintiffs' participation in the Plan prior to their actual termination from employment, and while plaintiffs were essentially performing services in connection with the winding up of the Chicopee facility, nonetheless all nine plaintiffs were still contributing to the efficient operation of Servus in Chromalloy and were physically present and working on December 31, 1982.

15. The contract claims of plaintiffs Aronson and Crivelli are more difficult, however. Given the Court's conclusion concerning plaintiffs' claims under ERISA, the claim of Crivelli is of no consequence. However, since Aronson was employed on

January 1, 1981 and the February 27 letter to Aronson from Chromalloy guaranteed salary and fringe benefits for up to twelve months following termination of his employment, his contract claim could extend to any contribution accruing on the December 31, 1982 accounting, if he remained unemployed on that date.

16. Of course, by December 31, 1982, Aronson was no longer employed by Servus in Chromalloy and therefore would not be entitled to participate under the terms of the Plan. Aronson contends that the term "fringe benefits" as used in the February 27 letter must be understood as it would be in common parlance, that is, to include usual contributions to a profit-sharing plan. Defendant Chromalloy, on the other hand, argues that Aronson has failed to prove by a preponderance of the evidence that the term "fringe benefits" was intended to include any contribution under the Plan.

17. Problematically, defendant has not shown to what benefits the term "fringe benefits" could have referred besides retirement benefits, although the Court might infer that there were other such benefits given Aronson's position as Vice-President. Defendant does point out that personnel of Chromalloy continually in November 1981 expressed no intent to make contribution on behalf of employees of the Chicopee facility, and since no contribution would be made on behalf of Aronson as such an employee, this expression of intent generally is at least some evidence that the term "fringe benefits" was not intended to extend to contribution under the Plan. Furthermore, the evidence adduced is certainly insufficient to support promissory estoppel.

18. However, the Court is unable to conclude that the term "fringe benefits" as used in the February 27 letter to Aronson meant something other than the ordinary meaning of the term. Clearly, retirement benefits are within the ambit of the plain meaning of the term "fringe benefits," and the evidence of the statements of Chromalloy personnel made in

light of subsequent events cannot be viewed as altering that plain meaning. Therefore, the Court concludes that Chromalloy obligated itself to continue fringe benefits to Aronson for a period of one year from his termination of employment by Chromalloy. While the remedy for ERISA violations to be ordered by the Court subsumes any contribution for 1981 to which Aronson was contractually entitled, Aronson, if he did not commence new employment as of December 31, 1982, may further recover from defendant Chromalloy an amount equal after taxes to his allocation—as if he were a participant in the Plan—of the employer's 1982 contribution to the Plan, if any.

19. With respect to all nine plaintiffs, the Court under ERISA may fashion "appropriate equitable relief" to remedy the failure of the fiduciaries to comply with the terms of the Plan and the dictates of ERISA. 29 U.S.C. § 1104(a)(3). Quite clearly, under the facts of this case, the fiduciaries, and not the Plan itself, should be held liable for the losses resulting to plaintiffs. 29 U.S.C. § 1109(a) provides that "a fiducairy with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses resulting from such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate . . . ." *Id.* Because each of the defendant fiduciaries had knowledge of the exclusion of plaintiffs from participation in the Plan and failed to make efforts to remedy that breach, each and all of the fiduciaries may be held liable for the breach of fiduciary duty of any of the fiduciaries. 29 U.S.C. § 1105(a)(3).

20. However, in this case, it was the defendant Chromalloy which directly benefitted from the failure to make a contribution on behalf of plaintiffs for the year 1981, and the Court by no means has determined that the actions of the defendant trustees Tobin and Caruso amounted to "gross neg-

ligence" or "wilfull misconduct." While the issue is not specifically before the Court, the Court does note that the indemnification provisions of the Plan, Section 10.4, and the Trust, Sections 7.1, 7.2, would appear to apply to the instant facts such that the defendant Chromalloy should bear the burden of providing the relief to be ordered by the Court. Indeed, as was observed in *Freund* v. *Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wisc. 1979), "[r]ights of contribution and indemnity between or among breaching fiduciaries are within the equitable discretion of the Court, and may be granted, as just, under the facts of the case." *Id.* at 635, n. 1, *citing* Bogert, Trusts and Trustees § 862, p. 24. For these reasons, the Court will direct that the monetary relief ordered be borne by the defendant Chromalloy.

21. Plaintiffs are entitled to a remedy making them whole for losses resulting from the failure of defendants to make a contribution to the Plan on their behalf as participants for the year 1981. Plaintiffs point out that under applicable tax law, monies due the plaintiff under the Plan are taxable to the plaintiffs only to the extent such funds are actually distributed to them. 26 U.S.C. § 402(a)(1), and that individual tax liability for distributions from the Plan may be deferred by a rollover of such distributions into a qualified trust or retirement plan, *id.*, § 402(a)(5), or taxed at more favorable rates than ordinary income generally. *Id.*, § 402(e). Consequently, an outright payment by defendants to plaintiffs sufficient to restore plaintiffs could well be substantially larger than a contribution to the Plan with subsequent allocation and distribution, and, in any event, calculation of such an outright payment would be difficult given the varying tax positions of each of the plaintiffs.

22. The Court will therefore order the following relief: first, that with respect to the plaintiffs, the November 26, 1981 resolution of the Pension Committee of Chromalloy purporting to terminate partially the Plan effective September 30,

1981 and the accounting based thereon be declared void; second, that defendant Chromalloy contributed to the Trust an amount equal to 8% (eight percent) of the total compensation earned by the plaintiffs in 1981, including the amounts paid Aronson and Crivelli for vacation time accrued during 1981, to be allocated among the plaintiffs' accounts under the Plan, effective December 31, 1981 in proportion to their respective 1981 compensation, again including the amounts paid Aronson and Crivelli for vacation time accrued in 1981; third, that there be an accounting of the account balances of the plaintiffs in the Plan as of December 31, 1981, and that defendant Chromalloy further contribute to the Trust an amount to be allocated among the plaintiffs in proportion to their respective account balances as of December 31, 1981, equal to the interest on such account balances at the prime rate of the First National Bank of Chicago, Chicago, Illinois (*see* Plan, Section 6.1(b)), from December 31, 1981, until the date such contribution is actually made; and fourth, that the Trustees of the Trust distribute to the plaintiffs within ten days after such contributions are made an amount equal to their respective account balances in the Plan less the amounts actually received by the plaintiffs in prior distributions from the Trust.

23. Plaintiffs have requested an award of punitive damages. As defendants contend, however, there is a substantial question as to whether punitive damages may be awarded under ERISA. *Compare Baeten* v. *VanEss*, 474 F.Supp. 1324, 1331 (E.D. Wisc. 1979), (*dicta* to the effect that punitive damages may be warranted as an appropriate and necessary sanction in "extreme cases"), with *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1216-17 (8th Cir. 1981) and cases cited therein (punitive damages inappropriate in action under ERISA). Without entering the fray of conflicting views, however, the Court determines that an award of punitive damages, even if available under ERISA, is unwarranted on the facts of this case.

24. 29 U.S.C. § 1132(g)(1) provides that in any action brought by a participant the court may allow a reasonable attorney's fee and costs of action to either party. *Id.* The Court determines that this is an appropriate case for an award of fees and costs, and any such award should be paid by the defendant Chromalloy. The Court will order the parties to attempt to reach an agreement concerning costs and attorneys' fees within forty-five days of the date of the Court's Order, and if no agreement can be reached, the Court will thereafter receive materials germane to the issue of costs and fees from the parties and enter an order accordingly.

CONCLUSION

For the reasons stated herein, the Court concludes that the defendant fiduciaries breached the terms of the Plan and violated the provisions of ERISA such that plaintiffs are entitled to appropriate equitable relief. Additionally, plaintiff Aronson is entitled to recover in contract. An award of punitive damages is unwarranted, and the parties shall attempt to negotiate a settlement of costs and attorney's fees, and absent a settlement, the Court shall take up the matter subsequently.

Order Accordingly.

(s) FRANK H. FREEDMAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 82-0177-F

ELLIET N. ARONSON, ET AL.,
PLAINTIFFS,

v.

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, ET AL.,
DEFENDANTS.

ORDER
MAY 19, 1983

FREEDMAN, D.J.

In accordance with the Memorandum, Findings of Fact, and Conclusions of Law entered by the Court this date, it is hereby Ordered:

A. That the November 25, 1981 resolution of the Pension Committee of Chromalloy American Corporation and the accounting based thereon be declared void:

B. That Chromalloy American Corporation contribute to the Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Trust ("the Trust") an amount equal to 8% of the total compensation paid to the plaintiffs for the year 1981, including amounts paid to plaintiffs Aronson and Crivelli for vacation time accrued during 1981, to be allocated among plaintiffs' accounts under Servus Rubber Division of Chromalloy American Corporation Employees'

Profit-Sharing Plan ("the Plan"), in proportion to their respective 1981 compensation, including amounts paid to plaintiffs Aronson and Crivelli for vacation time accrued during 1981;

C. That there be an accounting of the account balances of the plaintiffs in the Plan as of December 31, 1981, and that Chromalloy American Corporation further contribute to the Trust an amount to be allocated among the plaintiffs in proportion to their respective account balances as of December 31, 1981, equal to the interest on such account balances at the prime rate of the First National Bank of Chicago, Chicago, Illinois, from December 31, 1981, until the date such contribution is actually made;

D. That the Trustees of the Trust distribute to the plaintiffs within ten days after such contributions are made an amount equal to their respective account balances less the amounts actually received by the plaintiffs in prior distributions from the Trust;

E. That Chromalloy American Corporation pay to plaintiff Aronson an amount equal after taxes to his allocation, as if he were a participant in the Plan, of the employer's 1982 contribution to the Plan, if any; and

F. That the parties attempt to reach an agreement concerning costs and attorney's fees for the plaintiffs within forty-five days of this Order; if no such agreement can be reached, the Court will thereafter receive materials germane to the issue of costs and attorney's fees from the parties and after making its own determination, enter an appropriate order.

It is So Ordered.

(s) FRANK H. FREEDMAN
United States District Judge

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 83-1468

ELLIET N. ARONSON, ET AL.,

PLAINTIFFS, APPELLEES,

v.

SERVUS RUBBER, ETC., ET AL.,

DEFENDANTS, APPELLANTS.

JUDGMENT

Entered: March 21, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court of May 19, 1983, is vacated and the cause is remanded to the district court with instructions to enter judgment for Elliet N. Aronson and Lawrence Crivelli in accordance with the opinion filed this day and to enter judgment for the defendants in all other respects.

No costs.

By the Court:

FRANCIS P. SCIGLIANO, *Clerk.*

[cc: Messrs. McCormick and Dibble.]

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 83-1468

ELLIET N. ARONSON, ET AL.,

PLAINTIFFS, APPELLEES,

v.

SERVUS RUBBER, ETC., ET AL.,

DEFENDANTS, APPELLANTS.

Before

CAMPBELL, *Chief Judge*,
COFFIN, ALDRICH, BOWNES and BREYER,
Circuit Judges.

ORDER OF COURT

Entered: April 20, 1984

Upon consideration of appellees "Petition for Rehearing En Banc", which document has been submitted to the members of the panel and to the judges of the Court who are in regular active service, and no judge who was a member of the panel nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the suggestion for rehearing en banc is hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, *Clerk*.

[cc: Messrs. McCormick and Dibble.]

APPENDIX F

RELEVANT PROVISIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 ("ERISA")

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans, many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such

plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan:

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) **Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions**

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(a) requested by the Secretary of the Treasury, or

(b) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

Administrator's refusal to supply requested information

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Status of employee benefit plan as entity

(d)(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretaty shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

Jurisdiction

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary), the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Service upon Secretary of Labor and Secretary of Treasury

(h) A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

Administrative assessment of civil penalty

(i) In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

Direction and control of litigation by Attorney General

(j) In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

Jurisdiction of actions against Secretary of Labor

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

APPENDIX G

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN

Special Plaintiff's Accounting as of March 1, 1984

Name of Participant	Participant 1982 Compensation	1/01/81 Account Balance (1)	Investment Earnings for 1981 (2)	8% Company Contribution (3)	12/31/81 Account Balances (4) = (1) + (2) + (3)	Amounts Paid 2-09-82 (5)	Net Interest to March 1, 1984 (6)	Total Contribution (7) = (4) − (5) + (6)
Aronson, E.	$ 71,197.69	$ 55,863.09	$ 2,776.20	$ 5,695.82	$ 64,335.11	$ 53,079.99	$ 4,484.48	$ 15,739.60
Browning, L.	11,700.00	6,119.08	304.10	936.00	7,359.18	5,814.23	589.82	2,134.77
Cordeiro, N.	14,031.24	8,939.18	444.25	1,122.50	10,505.93	8,493.83	784.28	2,796.38
Crivelli, L.	24,300.00	19,332.38	960.75	1,944.00	22,237.13	18,369.24	1,543.36	5,411.25
Giguere, R.	18,922.53	6,299.62	313.07	1,513.80	8,126.49	5,985.77	781.02	2,921.74
Goldman, R.	21,308.26	12,136.51	603.14	1,704.66	14,444.31	11,531.87	1,121.88	4,034.32
Harubin, W.	23,000.12	18,655.07	927.09	1,840.00	21,422.16	17,725.67	1,477.95	5,174.44
Tietze, H.	17,136.60	9,153.07	454.88	1,370.93	10,978.88	8,697.06	873.04	3,154.86
Zielinski, J.	17,072.89	9,757.78	484.93	1,365.83	11,608.54	9,271.65	900.50	3,237.39
	TOTALS	$146,255.78	$ 7,268.41	$17,493.54	$171,017.73	$138,969.31	$12,556.33	$ 44,604.75

Interest Rates

1982, 1st quarter	15.75%	1983, 1st quarter	11.50%	1984, 1st quarter	11.00%
2nd quarter	16.50	2nd quarter	10.50		
3rd quarter	16.50	3rd quarter	10.50		
4th quarter	13.50	4th quarter	11.00		

OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-112

In the Supreme Court of the United States

OCTOBER TERM, 1984

ELLIET N. ARONSON, LUCIA B. BROWNING, NOE CORDEIRO, LAWRENCE CRIVELLI, RICHARD GIGUERE, ROBERT GOLDMAN, WALTER HARUBIN, HUGO TIETZE, and JOHN ZIELINSKI,

PLAINTIFFS-PETITIONERS,

v.

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, CHROMALLOY AMERICAN CORPORATION, DONALD TOBIN, TRUSTEE, AND JOHN CARUSO, TRUSTEE,

DEFENDANTS-RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Summary of Argument

The decision below was in accordance with the factual circumstances presented and with the body of law that applies to the Employee Retirement Income Security Act of 1974 ("ERISA"). There is no question of law at issue that justifies the grant of a writ of certiorari here.

* Chromalloy American Corporation has no parent companies and further it has no affiliates. The only subsidiary, which is not a wholly owned subsidiary, is Albe Far East Limited.

The Internal Revenue Code sections and regulations make it clear that the partial termination was non-discriminatory and that the establishment of the new accounting date was not improper.

Under the terms of the Plan and the Plan's pertinent sections, partial termination was accomplished by amendment or otherwise.

There was nothing discriminatory about the establishment of a retroactive Valuation Date of September 30, 1981. Arguably, such Valuation Date was not, under the facts presented, retroactive.

Argument

I. The Partial Termination of the Plan and the Establishment of a New Accounting Date Did Not Unlawfully Discriminate Against Plaintiffs as Participants in the Plan.

Title I of ERISA is entitled Protection of Employee Benefit Rights. Title I defines an individual employee's rights under a pension plan and provides a mechanism to protect such rights. Historically, the concepts of discrimination in a pension plan and termination of a pension plan were created in the Internal Revenue Code. Specifically, Congress, in the Internal Revenue Code, provided that pension and profit-sharing plans would only qualify for tax benefits if they did not discriminate in favor of certain classes of employees. Additionally, the Code also provided that when a plan was terminated, either fully or partially, the participating employees would be entitled to 100% of the benefits in the plans which has been contributed on behalf of the employees.

When ERISA was enacted, the concept of protecting the rights of the individual employees was established in Title I. Among other protections, the employees were to be protected against discrimination in plan coverage or participation and also to have their rights protected in the event of plan termination.

Title I does not define what constitutes discrimination in plan participation. In addition, it does not outline what constitutes a proper termination and what the rights are of a participant in the event of a plan termination. Part 2 of Title I contains a statement of the minimum coverage standards and vesting standards which a pension plan must satisfy. Labor Regulation Section 2530.200a-1 states that substantially identical requirements for plan participation or coverage are imposed by the Internal Revenue Code. Labor Regulation Section 2530.200a-2 also provides that treasury regulations under Sections 410 and 411 of the Internal Revenue Code relating to minimum vesting and participation shall apply for purposes of Sections 202-204 of ERISA. In other words, the concepts that have been established under the Internal Revenue Code for plan participation are being incorporated by reference into the section of ERISA which is designed to protect individual employees. This interrelation is important because it provides the justification for reviewing the Internal Revenue Code sections and regulations which deal with and define what constitutes non-discriminatory practices under a plan and what constitutes a proper termination of a pension plan.

The above-mentioned labor regulations provide an additional basis to justify the detailed reliance on the sections of the Internal Revenue Code and accompanying regulations. The non-discrimination concept and the rights of a participant during a complete or partial termination were established under the Internal Revenue Code. Consequently, we must look to the Internal Revenue Code's definitions to determine if proper compliance has been met. In other words, Congress designed the Internal Revenue Code to establish the rights of the individual plan participants. Through the Internal Revenue Code, Congress established what were discriminatory practices. It also established areas of non-discriminatory practice. The enforcement provisions of ERISA are simply designed to provide a mechanism to protect individual em-

ployees against discriminatory practices. However, what constitutes a discriminatory practice is defined through reference to the Internal Revenue Code.

A corporation is not required to provide absolute equality of treatment for all of its employees in order to have a non-discriminatory qualified plan under ERISA. For example, in order for a plan to be non-discriminatory, it is not necessary that all employees participate in the plan. Section 410(b) of the Internal Revenue Code of 1954, as amended. 26 U.S.C. Section 410(b). Under Section 410(b)(1)(A), it is only necessary that 70% or more of all employees are benefited under the plan. The term "all employees" does not include employees who have not met the minimum age and service requirement of the plan (Section 410(b)(1)(A), or employees included in a collective bargaining agreement (Section 410(b)(3)(A)). Consequently, Chromalloy theoretically could have established originally a profit-sharing plan solely for the benefit of its non-union persons at its Rock Island facility and could have excluded the persons at the Chicopee facility. Such a plan would have met the participation requirements of Section 410(b)(1) and would not have been discriminatory.

Normally, a corporation which establishes a pension or profit-sharing plan reserves the right to terminate such a plan at any time. Such a plan will be treated as a qualified non-discriminatory plan under ERISA if it fulfills the requirements of Section 411(d)(3) and the appropriate Treasury Regulations (*See* 26 CFR Section 1.401-6(b)(2) (1982)). Basically, the only requirement is that upon a complete or partial termination, the rights of all *affected* employees to benefits accrued to the date of such termination, or partial termination, to the extent *funded as of such date* are non-forfeitable (Section 411(d)(3)). The Treasury Regulations, Section 1.411(a)-7(a)(2), defines accrued benefit, in the case of a defined contribution plan, as the balance of the employee's account held under the plan (any profit-sharing plan is a defined contribution plan). *See*

also Treasury Regulation, Section 1.401-6(a)(1), which states that upon termination of the plan an employee must have a non-forfeitable right to the amounts credited to his account at the time of the termination.

As long as a corporation reserves the right to terminate the plan in the plan document, it can do so at any time. The employees will only be entitled to the funds in their accounts at the time of the termination. The corporation is not required to make a contribution for the employees in the year the plan is so terminated. For example, Chromalloy could have terminated the entire Profit-Sharing Plan on December 30, 1981. If this had happened, all the employees would have been entitled to 100% of the funds in their accounts on the termination date. Chromalloy would not have been required to contribute any additional funds in the Plan for 1981. Similarly, if a valid partial termination took place, the employees whose participation was properly terminated would only be entitled to 100% of the funds in their accounts on the termination date (Internal Revenue Code Section 411(d)(3); Treasury Regulations, Section 1.401-6(a)(1)). Chromalloy would not be required to make a contribution in 1981 for the employees whose participation ended as a result of the valid partial termination.

The terms of the Plan in question reflect the procedure permitted by the above-cited Internal Revenue Code sections and pertinent regulations. Under Section 12.1 of the Plan, Chromalloy reserved the right to terminate the Plan at any time. Additionally, under Section 11.3 of the Plan, Chromalloy reserved the right to amend the Plan at any time. Further, Section 12.2 of the Plan, as amended by the First Amendment to the Plan, provides:

> *Effect of Termination.* Upon the partial or complete termination of the Plan and Trust, or in the event of complete discontinuance of the Company's contributions, the date thereof being called the "Date of Termination," each Participant affected by the partial or complete

> termination shall be entitled to one hundred percent (100%) of his account in Trust anything hereinabove to the contrary notwithstanding, determined on the Date of Termination as if such date were an Accounting Date.

Section 11.4 of the Plan provides:

> *Employment Rights.* Nothing contained in the Plan shall be construed to create a contract of employment between the Company and any person employed by the company, or to create a right in any person employed by the Company to be continued in the employment of the Company, or to limit the right of the Company to discharge any person employed by the Company with or without cause.

Thus, Section 11.4 of the Plan is intended to permit the Company to amend or terminate the Plan at any time without being faced with the claim that the Plan constituted an employment contract and, therefore, that the Company should be prohibited from unilaterally amending or terminating. Section 11.4 does not violate the rules of ERISA. This Plan was originally approved by the Internal Revenue Service, and at all time contained this provision. Consequently, Chromalloy could amend or terminate this Plan at any time, and as long as it met the requirements of the above-cited portions of the Internal Revenue Code and the pertinent regulations, such amendment or termination would not violate ERISA.

As an extreme example, Chromalloy could have terminated the entire Plan at any time in 1981 and none of the participants could have asserted a contractual right under the Plan for a contribution in 1981. Similarly, Chromalloy also had the right to partially terminate the Plan in 1981, and as long as such termination did not cause the Plan to violate the minimum participation standards of Section 410(b), the Plan would remain qualified and would not be considered discriminatory.

There is no question that in general partial terminations of profit-sharing plans may properly take place under ERISA and in fact do so with regularity. For tax purposes, terminations and partial terminations are governed by Section 411(d)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), 26 U.S.C. Section 411(d)(3). The tax regulations promulgated under the Code provide in part:

> For purposes of this section, the term "termination" includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, *will be determined on the basis of all the facts and circumstances.*

26 CFR Section 1.401-6(b)(2) (1981) (emphasis added). In line with the above regulations, it is clear, therefore, that a partial termination of a plan occurs when a group of employees who are participants in the plan are excluded from participation either by reason of an amendment to the plan or by reason of being discharged by the employer. Further, it has long been established that it is unnecessary for an entire group of participants to be excluded by reason of discharge from employment. It is only necessary that a *significant* number of employees who had been covered under the plan are excluded. The Internal Revenue Service rulings supporting that position are numerous. *See, e.g.*, Revenue Ruling 81-27, Internal Revenue Bulletin 1981-4; Revenue Ruling 73-284, Internal Revenue Bulletin 1973-2; Revenue Ruling 72-510, Internal Revenue Bulletin 1972-2; Revenue Ruling 72-439; Special Ruling dated September 1, 1978, [1980] Pension Plan Guide (CCH) Section 17, 367S.

Contrary to petitioners' position, it is unnecessary that all participants in a plan, who make up a division or portion of a business that is being closed or wound down, be discharged before a partial termination of the plan can take place. In that regard, the tax regulations specifically provide:

> Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the *winding up* of the employer's trade or business, the employer *begins to discharge* his employees.

26 CFR Section 1.401.6(b)(1) (1982) (emphasis added). As stated earlier, a portion of this same tax regulation includes in the definition of "termination" both a partial termination and a complete termination of a plan.

Based upon the above-mentioned regulations, the pertinent sections of the Internal Revenue Code, and the interpretations of the above found within the pertinent Revenue rulings, it is clear that a partial termination of a plan will occur merely if a significant number or percentage of employees are excluded from participation in the plan by reason of discharge from employment, without the need for amendment of the Plan (even though an amendment did take place in this case). Thus, a partial termination of a plan can in fact take place even though all of the participants are not discharged. This specific ruling has already been set forth in Revenue Ruling 72-510. Revenue Ruling 72-510 reveals the same issues found in Revenue Ruling 81-27, and in fact those revenue rulings arose out of the same request concerning whether or not a partial termination of a plan was proper under the given circumstances. Although Revenue Ruling 81-27 superseded Revenue Ruling 72-510 in an attempt to restate the position of that prior revenue ruling in view of the enactment of ERISA, it is clear upon comparison of the two rulings that the facts

and the Court's decision are the same. Revenue Ruling 72-510 specifically refers to the language in Section 1.401-6(b)(1) of the regulations and states that a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer *begins to discharge* his employees. Both rulings go on to assert the position that a partial termination may take place when "a significant number of employees who have been covered under the employer's pension plan were discharged in connection with the winding up of a part of the employer's business."

The definition as to what is a "significant" discharge of employee participants when dealing with a partial termination of a plan has never been defined clearly. However, the Revenue Rulings dealing with the subject of partial termination have one common denominator. As stated in one ruling:

> In each set of facts presented in the rulings, there was "a significant percentage" of employees who had been covered by a plan, but were subsequently excluded from participation either by discharge or plan amendment. These "significant" percentages were 70.6%, 56.6% and 80%, respectively.

Special Ruling dated September 1, 1978, [1980] Pension Plan Guide (CCH) Section 17, 367S. The above percentages were not prerequisites set within the specific revenue rulings for the validity of a partial termination but merely were based upon the facts presented in each instance. As to what percentage or number must be discharged in order that it be considered significant, one commentator has stated:

> No magic percentage or number has been specified, however, although Question 23(b) of Form 5500 indicates that the Service may look suspiciously at a more than 20 percent reduction in coverage.

Sollee and Shapiro, 351 Tax Management, *Pension Plans-Qualifications*, at A-85 (1979).

The facts in this matter indicate sufficient grounds for a partial termination of the Plan. On August 28, 1981, the substantial portion of the assets of the Servus plant at Chicopee were sold. Thereafter, all production ceased at Chicopee and there began what was characterized at the trial by both Mr. Aronson and Mr. Caruso as a winding down process. As stated by Mr. Caruso, Vice President of Finance at Servus, on August 28, 1981, there were approximately 400 employees at the Chicopee plant, whereas by the end of September there remained only approximately 50 employees. In his testimony, Mr. Caruso explained that participants in the Servus Plan were non-union employees. In that regard, as stated in a Stipulation filed by the parties prior to trial ("Stip.") and found in the defendants' Appendix to their brief in the United States Court of Appeals ("A.A."), on August 28, 1981, the number of non-union persons employed by Chromalloy at the Servus Rubber Division in Chicopee was 68, of whom 64 were participants in the Plan (Stip. 10, A.A. 69). In contrast, the number of non-union persons employed at the Chicopee facility on September 30, 1981 was 29, of whom 27 were participants in the Plan (A.A. 69).

It is clear from the facts set forth in the Stipulation and from the testimony presented at trial that immediately after August 28, 1981, production at the Chicopee facility had completely shut down and that a winding down of the business was taking place. On December 31, 1980, there were 168 participants in the Plan then employed by Chromalloy in Servus Rubber, 93 at the Servus Rubber Division in Rock Island and 75 at the Chicopee facility (Stip. 7, A.A. 69). In contrast, by September 30, 1981, at the Chicopee facility there had been employment reductions which had resulted in the discharge of 48 participants, resulting in the remainder of only 27 participants (Stip. 7 and 10, A.A. 69). By October 31, 1981, the number of persons who would have been participants but for the partial termination had been reduced at Chicopee from 22 to 18 on

November 31, 1981, and to 11 on December 31, 1981. It is clear, that by September 30, 1981, there had already been a significant discharge of employed Plan participants. Certainly well before September 30, 1981, Chromalloy, in its winding up of the Chicopee facility's business, had begun to discharge its employees as required under the appropriate tax regulation. 26 CFR Section 1.401-6(b)(1). By that date a significant number of Plan participants had already been discharged and an overwhelming number of Plan participants at the Chicopee facility had been discharged by December 31, 1981.

II. THE PLAN AUTHORIZED PARTIAL TERMINATION WITHOUT THE NEED FOR AMENDMENT, AND THE PROPER STEPS FOR PARTIAL TERMINATION TOOK PLACE EITHER BY AMENDMENT OR OTHERWISE.

III. THE RESOLUTION OF NOVEMBER 25, 1981 ADOPTED BY THE PENSION COMMITTEE OF CHROMALLOY AMERICAN CORPORATION, PURPORTING TO TERMINATE PARTIALLY THE SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN (THE PLAN) AND ESTABLISHING A VALUATION DATE OF SEPTEMBER 30, 1981 AS TO THE PARTICIPANTS OF THE CHICOPEE FACILITY WAS AN EFFECTIVE AMENDMENT OF THE PLAN.

On November 12, 1982, Chromalloy submitted an Application for Determination to the Internal Revenue Service (Stip. 15, A.A. 71). A copy of this application on Form 5310, along with the documents submitted therewith, is contained in the Appendix on appeal at 175. Chromalloy received a determination letter from the Internal Revenue Service with respect to the Plan dated January 21, 1982 (Stip. 16, A.A. 71). A copy of this letter is contained in that Appendix at 185.

On November 25, 1981, a resolution was passed by the Unanimous Written Consent of the Pension Committee of Chromalloy American Corporation, which resolution stated:

> RESOLVED, that the Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Plan be partially terminated with respect to those participants who were employees of the Servus Vinyl Division at the date of the announcement to close down that operation with the date of termination and valuation, as defined in the Plan, be established as September 30, 1981, effective September 30, 1981...

(A.A. 173).

Certain provisions of the Plan are relevant to the issues of contribution and allocation. The Plan provides in Section 4.1 for contributions by Chromalloy as follows:

> *Company Contributions.* Contributions to the Trust for a Plan Year, shall be made only out of the net profits of the company for such year, or out of accumulated earnings and profits of prior years, and shall be in such amount (which amount may be stated as a percentage of the compensation of eligible Participants) as the Company, in its sole discretion, shall determine by appropriate corporate action prior to the end of such year; provided, however, that to the extent that there are net profits available, the Company shall contribute an amount equal to three percent (3%) of the compensation of all Participants....

Chromalloy's contributions are to be allocated as follows:

> *Allocation of Company Contributions.* The Company Contributions for each Plan Year when made shall be allocated as of the end of that Plan Year to each Participant (to be credited to the Trust Account of each Participant) in an amount determined by the ratio of each Participant's Compensation paid for such Year to the total aggregate of such Compensation of all such participants for such Year....

(Section 4.5). The Plan "Accounting Date" was set as December 31st of each year (Section 2.1(g)).

The language of the Plan authorizes its termination without the need for an amendment. Section 12.1 provides in part:

> *Event of Termination.* The Company, with the approval of the Pension Committee of Chromalloy American Corporation, reserves the right to terminate the Plan and Trust, or to discontinue completely Company contributions, by giving written notice of the date of such termination or discontinuance, hereinafter referred to as the "Date of Termination," to the Trustee.

That notice to the Trustees took place cannot be disputed in view of the fact that one of the Trustees, John Caruso, was one of the individuals to sign the Application for Determination Upon Termination submitted to the Internal Revenue Service, and further that *both* Trustees (John Caruso and Donald Tobin) signed the letter concerning partial termination that was sent to all participants and received by the plaintiffs sometime after August 28, 1981 (Stip. 14, A.A. 70). In any event, the purpose of notice to the Trustee is to insulate them from liability and not actually to effectuate a termination (or partial termination) of the Plan or an amendment of the Plan. This is reflected in Section 7.1 of the Profit-Sharing Trust, which section further provides in part:

> Any action taken or omitted to be taken by the Trustee by authority of any representative of the Company within the scope of their authority shall be as effective for all purposes hereof as if such action or non-action had been authorized by the Company. The Company, and the Trustee shall be fully protected in acting and relying upon any evidence described in this paragraph.

Under the circumstances, the view that written notice to the Trustees is required absolutely before partial termination can be accomplished improperly places form over substance. Further, to impose upon the courts a requirement that, without

exception, all terms of all pension plans must be construed in favor of employees and against employers would ignore the myriad factual situations that might arise. Cases must be dealt with individually, applying the general understanding that, where the circumstances warrant it, plans should be construed in favor of the employees.

Based upon the relevant facts, the November 25, 1981 resolution as to the partial termination with respect to those participants who were employees at the Chicopee facility, and the above-mentioned portions of the Plan, it is clear that, by appropriate amendment or otherwise, the Plan was partially terminated as to the participants at the Chicopee facility as of September 30, 1981. That the resolution was adopted on November 25, 1981 retroactive to September 30, 1981 is by no means inappropriate and such practice takes place routinely. Petitioners have presented no law which prohibits the actions taken by the Pension Committee. Consequently, as of the Accounting Date of December 31, 1981, the petitioners and any other employees who might have been still employed at the Chicopee facility were no longer participants in the Plan and were not entitled under the terms of the Plan to any contribution.

Chromalloy followed all of the necessary requirements for a proper non-discriminatory partial termination. Treasury Regulation, Section 1.401-6(b)(2), already cited, provides that a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage by reason of amendment or discharge from employment. Review of the Plan indicates that an amendment actually did take place. In that regard, Section 11.3 of the Plan defines an amendment and provides in part:

> The Company reserves the right to amend the Plan at any time by written resolution of the Pension Committee of

> Chromalloy American Corporation, including, but not limited to, the right to change the amount or method of determining Company contributions.

Chromalloy, through the Pension Committee, amended the Plan to establish a partial termination by virtue of the resolution that was adopted on November 25, 1981. In addition, Section 11.3 of the Plan also provides that any amendment may, by its terms, be retroactive.

Again, it is obvious that the resolution (and therefore the amendment), was communicated to the Plan Trustees and therefore became effective.

Petitioners' argument that partial termination of the Plan as to participants at the Chicopee plant is discriminatory is unsupported by evidence or testimony. Certainly terminations or partial terminations are not discrimination *per se*. Petitioners must bear the burden of introducing some evidence indicative of actual discrimination. They failed to do so. What the evidence did reveal instead was that a partial termination properly took place as to the facility in Chicopee that had ceased operations and was rapidly discharging employees.

Petitioners' claim that respondents could have had no purpose in adopting the November 25, 1981 resolution other than to prevent petitioners from obtaining their right to a contribution was again unsupported by evidence. On the contrary, respondents were faced with a duty to attempt to give the greatest benefit to the largest possible number of participants. This included, among other things, the establishment of a Termination Date and Valuation Date which in respondents' good faith judgment would result in the best possible distribution to the largest number of participants. Respondents had no way of forecasting whether the establishment of a later date would be to the benefit or detriment of petitioners.

Respondents respectfully submit that 29 U.S.C. Section 1140, as relied upon by petitioners, was designed primarily to prevent employers from discharging or harassing their em-

employees in order to keep them from obtaining vested pension rights. The thrust of this section is to protect the participants against actions which are designed to harass him or to take away from him rights to which he is entitled under the plan. Such actions have not taken place in this particular case. The Company could have established a plan which excluded petitioners from participating in the first place. The Company chose not to take such action. Ultimately, because of an independent business decision, it terminated the operation of its Chicopee plant and at the same time terminated the profit-sharing plan with reference to these employees. It took this action as a business judgment and not to discriminate intentionally against these employees. The partial termination met the requirements of the Internal Revenue Code and was not treated as discriminatory under that section.

Arguably, the petitioners' position that the termination and valuation or accounting date were discriminatory because these dates were established retroactively is not factually correct. Based on the evidence and exhibits in the case one could conclude that the partial termination actually took place on September 30th. Arguably the documents, including the resolution by the pension committee, simply memorialize the action that took place at an earlier time, *i.e.*, September 30, 1981. As a practical matter, the accounting date is established at the same time as the date of termination for administrative convenience. Certainly there was no evidence that the Company did not set September 30th as the accounting date in order to deprive the terminated participants of additional earnings from October 1, 1981 onward. Whenever anyone terminates from a pension or profit-sharing plan, a valuation or accounting date has to be established. As a practical matter, a date has to be chosen for calculating the amount that is attributable to the account of the individual participant who is terminating. In most pension plans there are no separate funds set aside in each account. Under a plan's accounting mecha-

nism, each individual participant will be treated as having a proportionate share of the funds in the pension trust. In such a situation, all of the participants are actually sharing in the appreciation or depreciation in the assets of the trust. Consequently, when a participant terminates, an accounting must take place in order to determine what the value is of that person's share of all of the trust assets as of the day of termination. In practice, this accounting always takes place before the funds are actually distributed to a participant. Therefore, when the funds are actually distributed to a participant who is terminated, the actual market value of all of the pension trust assets at the time of distribution may have actually increased or decreased in value.

The approach adopted by the Plan here simply reflects the administrative approach that normally takes place when a participant terminates from the Plan. In this case, instead of a termination by one participant, a number of participants terminated through the partial termination of the Plan. In order to handle this administratively a termination date was established. Normally, the termination date is also treated as an accounting or valuation date. At this point in time, the value of each terminated participant's account is established. The actual distribution of the funds attributed to each participant will not take place until a number of months following the termination date. As a normal rule the participants who have been terminated do not participate in the appreciations or depreciations in the funds following the termination and valuation dates. This procedure is followed not to discriminate against the terminated participants and deny them the ability to share in the earnings and appreciation or in the depreciation in the total Plan assets. Rather, it is simply done to create an administratively proper method to account for and distribute funds. Respondents sincerely doubt the petitioners would have argued that they were discriminated against if the value of the fund assets had actually declined from September 30, 1981 until the time of actual distributions.

Conclusion

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter.

Respectfully submitted,

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